SUBJECT INDEX.

	PAGE
PETITION FOR CERTIORARI	1
Opinion Below	3
Jurisdiction	3
Statement of the Case	6
Questions Presented	14
Statutes Involved	20
Specification of Errors	20
Reasons for Allowance of Writ	24
Conclusion	28
BRIEF OF ARGUMENT	29
BRIEF ON BEHALF OF PETITIONERS	39
A. It is the Duty of State Court to Enforce Rights under the Federal Constitution	40
B. This Court has Final Say where Claim is Based on Denial of Constitutional Rights	42
C. Petitioners were Denied Due Process, Equal Protection and Rights under Constitution and Laws of the United States by State Court Action	44
I. In Overruling Petitioners' Motion to Dismiss Without Prejudice	44
II. In Denying Interlocutory Appeal, Calling Special Term, Forming Trial in Face of Threats and under Armed Guards when Petitioners were Claiming Constitutional Rights, and Insisting on Their Right to Trial in Federal Court	49
III. In Proceeding to Judgment *Ex Parte* when Case was not Triable	56
IV. In Proceeding to Trial Including Cross-bill, when Practice Permitted No More than Dismissal with Prejudice	58

SUBJECT INDEX—(Continued)

PAGE

V. In Awarding Judgment on Cross-bill of Ridgeways 60

VI. In Proceeding on Cross-bill of Gulf when Demurrer was Pending without Hearing thereon, without Allowing Time for Answer, and when Petitioners had Compromised with Gulf 62

VII. In Awarding Judgment on a Controversy which had become Moot 71

VIII. In Awarding Judgment on Cross-bill showing no Right to Relief 74

IX. In Affirming on Appeal on Point not Presented by the Record, and as to which Petitioners had no Chance to Defend 87

X. In Affirming Judgments on Cross-bills and Extending Judgment to Other Litigants Not Parties or Privies thereto, and to Issues Not Involved, and Extending this Action to Bar Civil Actions in the Federal Court 95

CONCLUSION 105

CASES CITED.

PAGE

Adam v. Saenger, 303 U. S. 59, 82 L. Ed. 649 68
Adams v. Lucedale etc. Co., 113 Miss. 608, 74 So. 435 45
American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231 ..... 62, 71, 94
American Wood Paper Co. v. Heft, 8 Wall. 333, 19 L. Ed. 379 72
Ancient etc. Order v. Michaux, 279 U. S. 737, 73 L. Ed. 931 68
Angel v. Bullington (Feb. 17, 1947) L. Ed. Adv. Opinions, Mar. 10, 1947, p. 557 ..... 39, 43, 53, 90
Ayres v. Carver, 58 U. S. 591, 15 L. Ed. 179 78
Ayres v. Chicago, 101 U. S. 184, 25 L. Ed. 838 78
Baird v. Bardwell, et al, 60 Miss. 164 ..... 58, 59
Bass v. Borries, 116 Miss. 419, 77 So. 189 100
Belcher v. Wilkerson, 54 Miss. 677 ..... 78, 79
Bigelow v. Old Dominion etc. Co., 225 U. S. 111, 56 L. Ed. 1099 ..... 102, 105
Brinkerhoff etc. Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107 ..... 62, 94
Broderick v. Rosner, 194 U. S. 629, 79 L. Ed. 1100 43
Brooklyn City etc. Co. v. National Bank, 102 U. S. 14, 26 L. Ed. 61 102
Brown v. Mississippi, 297 U. S. 278, 80 L. Ed. 682 52
Buckingham v. Wesson, 54 Miss. 526 76
California v. San Pahlo etc. Co., 149 U. S. 308, 37 L. Ed. 747 73
California etc. Co. v. United States, 192 U. S. 355, 48 L. Ed. 476 84
Canadian etc. Co. v. Fitzpatrick, 71 Miss. 350, 14 So. 270 45
Carter v. Harvey, 7 So. 286 76
Chambers v. State, 309 U. S. 227, 84 L. Ed. 716 ... 44
Chantangco v. Abaroa, 218 U. S. 476, 54 L. Ed. 1116 102
Chase National Bank v. Norwalk, 291 U. S. 431, 78 L. Ed. 894 ..... 62, 70, 96, 104

CASES CITED—(Continued)

PAGE

Chicago etc. Co. v. Rambo, 298 U. S. 99, 80 L. Ed. 1066 ..... 44, 68
Chicago etc. Co. v. Union etc. Co., 109 U. S. 702, 27 L. Ed. 1081 45
C. I. O. v. McAdory, 325 U. S. 472 89 L. Ed. 1741 ... 73
Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. Ed. 1027 93
Coleman v. Smith, 124 Miss. 604, 87 So. 7 100
Commonwealth v. Williams, 294 U. S. 176, 79 L. Ed. 841 56
Crescent City etc. Co. v. Butcher's Union, 130 U. S. 141, 30 L. Ed. 614 42
Dakota County v. Glidden, 113 U. S. 222, 28 L. Ed. 981 73
Davis v. Weschsler 90
Desollar v. Hanscome, 158 U. S. 606, 39 L. Ed. 956 .. 101
DeWeese v. DeWeese, 55 Miss. 315 ..... 79, 80
Domorest v. City Bank, 321 U. S. 36, 88 L. Ed. 526 43
Donald v. Philadelphia etc. Co., 241 U. S. 329, 60 L. Ed. 1027 55
Dorsey et al v. Sullivan, 24 So. (2d) 852 57
Dows v. The City of Chicago, 11 Wall. 108, 20 L. Ed. 65 84
Eastman v. Wyatt Lumber Co., 102 Miss. 313, 59 So. 93 86
Eustice v. Holmes, 52 Miss. 314 85
Fisher v. State, 145 Miss. 116, 110 So. 361 52
Georgia Railway etc. Co. v. City of Decatur, 295 U. S. 165, 79 L. Ed. 1365 94
Gilmer v. Felhour, 45 Miss. 627 ..... 78, 79
Hansberry v. Lee, 311 U. S. 32, 85 L. Ed. 22 ..... 96, 99
Harrison v. St. L. & S. F. Railroad Co., 232 U. S. 318, 58 L. Ed. 621 54

CASES CITED—(Continued)

	PAGE
Hayes, et al. v. First Joint Stock Land Bank, 174 Miss. 880, 165 L. Ed. 605	100
Hebert v. Louisiana, 272 U. S. 312, 71 L. Ed. 270	52
Helis v. Ward, 308 U. S. 365, 84 L. Ed. 327	94
Hinds et al v. Martin (C. C. A. 5) 286 Fed. 653	76
Holgate v. Eaton, 116 U. S. 33, 29 L. Ed. 538	84
Hooven etc. Co. v. Evatt, 324 U. S. 652, 89 L. Ed. 1252	68
Hovey v. Elliott, 167 U. S. 409, 418, 42 L. Ed. 215	67
International Harvester Co. v. Wisconsin, 322 U. S. 435, 88 L. Ed. 1373	68
Irving Trust Co. v. Day, 314 U. S. 556, 86 L. Ed. 920	43
Jacks v. Bridwell, 51 Miss. 881	79
Kapiolani Estate v. Atcherley, 238 U. S. 119, 59 L. Ed. 1229	103
Ladner v. Ogden, 31 Miss. 332	78, 79
Lamar Life Ins. Co. v. Billups, 175 Miss. 771, 169 So. 32	57
Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. Ed. 1102	68
Litchfield v. Goodnow, 123 U. S. 549, 31 L. Ed. 199	102
Longmeyer v. Mars, 124 Miss. 77, 86 So. 753	86
Lovell v. City of Griffin, 303 U. S. 444-453, 82 L. Ed. 949	43
Lyon Co. v. Ratliff, 129 Miss. 342, 92 So. 229	86
Majure v. Johnson et al, 192 Miss. 810, 7 So. (2d) 545	61
Malinsky v. People, 321 U. S. 401, 89 L. Ed. 1029	67
Markham v. Allen, 326 U. S. 490, 90 L. Ed. 256	56
McKnett v. St. Louis etc. Co., 292 U. S. 230, 78 L. Ed. 1227	42
Milkwagon Drivers etc. v. Meadowmoor Dairies, 312 U. S. 715, 85 L. Ed. 1145	43
Miller et al v. Ricky, 218 U. S. 258, 54 L. Ed. 1032	78
Mills v. Green, 159 U. S. 651, 40 L. Ed. 293	73
Minnesota v. National Tea Co., 309 U. S. 551, 84 L. Ed. 920	43

CASES CITED—(Continued)

PAGE

Missouri etc. Co. v. Larabee, 234 U. S. 459, 58 L. Ed. 1398 54
Mitchell et al v. Film Transit Co., 194 Miss. 550, 13 So. (2d) 154 ..... 50, 58, 59
Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791 ..42, 62, 94
Moore v. Dempsey, 261 U. S. 86, 71 L. Ed. 543 52
Moore v. New York etc. Exchange, 270 U. S. 593, 70 L. Ed. 750 78
Myles Salt Co. v. Iberia etc. District, 239 U. S. 478, 60 L. Ed. 392 ..... 92, 105
National Milk Products Assn. v. San Francisco, 317 U. S. 423, 87 L. Ed. 375 73
New York etc. Co. v. Head, 234 U. S. 149, 58 L. Ed. 1259 55
Old Colony Trust Co. v. Omaha, 230 U. S. 100, 57 L. Ed. 1410 105
Paepcke Leicht Lbr. Co. v. Savage, 137 Miss. 11, 101 So. 709 57
Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 55
Pennsylvania General Gas Co. v. Pennsylvania, 294 U. S. 189, 79 L. Ed. 850 43
Providence etc. Co. v. Goodyear, 76 U. S. 807, 19 L. Ed. 587 78
Postal etc. v. Newport, 247 U. S. 464, 62 L. Ed. 1215 ..... 42, 96, 97, 105
Radford v. Myers, 231 U. S. 725, 58 L. Ed. 454 105
Radio Corporation of America v. Radio Engineering Laboratories, 293 U. S. 1, 79 L. Ed. 163 105
Radio Station v. Johnson, 326 U. S. 120, 89 L. Ed. 2092 43
Riley et al v. New York Trust Co., 315 U. S. 343, 86 L. Ed. 885 96
Robb v. Connolly, 111 U. S. 624, 28 L. Ed. 542 41
Rogers v. Peck, 199 U. S. 425, 50 L. Ed. 256 52
Roller v. Holly, 176 U. S. 520, 44 L. Ed. 520 94

CASES CITED—(Continued)

PAGE

Russell v. Denson, 98 Miss. 862, 54 So. 439 .....45, 48
Russell v. Federal Land Bank, 180 Miss. 55, 176 So. 737 100
Russell v. Hickory, 116 Miss. 46, 76 So. 825 86
Russell v. Place, 94 U. S. 606, 24 L. Ed. 214 101
Saunders v. Shaw, 244 U. S. 317, 61 L. Ed. 1163 91
Schuylkill etc. Co. v. Commonwealth of Penn., 296 U. S. 113, 80 L. Ed. 91 .....43, 68
Sigman v. Lundy, 66 Miss. 522, 6 So. 245 ....79, 82, 83, 84
Smith v. Denny, 90 Miss. 434, 43 So. 479 57
Smith v. O'Grady, 312 U. S. 329, 85 L. Ed. 861 41
Snyder v. Massachusetts, 291 U. S. 96, 78 L. Ed. 674 52
Southern Pacific Co. v. State, 325 U. S. 761, 89 L. Ed. 1915 68
South Spring etc. Co. v. Amador etc. Co., 145 U. S. 300, 36 L. Ed. 712 73
State v. Hemmingway, 69 Miss. 491, 10 So. 575 45
State of Minnesota v. National Tea Co., 309 U. S. 551, 84 L. Ed. 920 106
Steele v. L. & N. R. R. Co., 323 U. S. 192, 89 L. Ed. 173 43
Terrell v. Burke, etc. Co., 257 U. S. 529, 66 L. Ed. 352 55
Thomason v. Neely, 50 Miss. 310 .....78, 79
Thomas v. Worcester, 114 U. S. 104, 29 L. Ed. 105 67
Titus v. Wallick, 306 U. S. 282, 83 L. Ed. 653 .....42, 67
Toucy v. New York etc. Co., 314 U. S. 118, 86 L. Ed. 100 43
True-Hixon Lbr. Co. v. Thorne, 171 Miss. 783, 158 So. 909 101
United Gas etc. Co. v. State of Texas, 303 U. S. 123, 82 L. Ed. 702 .....44, 68
United States v. Bank of New York and Tr. Co., 296 U. S. 463, 80 L. Ed. 331 .....41, 55
Van Zandt v. Town of Braxton, 149 Miss. 461, 115 So. 557 99

CASES CITED—(Continued)

	PAGE
Vaughan v. Hudson, 59 Miss. 421	76
Watkins v. State Board, 170 Miss. 26, 154 So. 277	99
Williams v. State of North Carolina, 325 U. S. 226, 89 L. Ed. 1577	68
Wood v. Davis, 7 Cranch 271, 3 L. Ed. 339	105
Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220	105

AUTHORITIES CITED.

19 American Jurisprudence, Equity, Section 318, page 227	64
30 Corpus Juris, 788	77
34 Corpus Juris 1014	103
50 Corpus Juris Secundum 293	102
Griffith's Mississippi Chancery Practice—	
Sections 534	46
Sections 263, 556	57
Sections 538, 562	59
Section 379	76
Mississippi Code of 1942—	
Sections 1538, 1539	46
Section 1148	49
Sections 1314, 1323	56
Section 1296	61, 63
Section 1286	65
Section 1289	63
Section 1240	65
Section 1241	65
Section 1244	65
Sections 1297, 1298	66, 67
Section 1310	66
Section 1325	85
Section 1957	49

IN THE
SUPREME COURT OF THE UNITED STATES

No. .....

N. L. HUDSON, ET AL.,
Petitioners,

versus

GULF REFINING COMPANY, ET AL.,
Respondents.

PETITION FOR CERTIORARI.

Come now N. L. Hudson, Mrs. Exie Hudson, Phillip L. Hudson, Mrs. Mary Lee Tilghman, Mrs. Lessie Hudson Smith, Charles A. Hudson, Mrs. Mai Hudson Thompson, E. S. Blackman, Graydon M. Blackman, Mrs. Mae Hudson, Mrs. Ruby Mae Mitchell, Mrs .Grace Hudson Hyde, and Mrs. Gertrude Hudson Ellison, Petitioners herein, and pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Mississippi in the case of N. L. Hudson, et al vs. Gulf Refining Company, et al, No. 36406 on the docket of said court.

The appeal was from a decree rendered in a suit of a local nature to quiet and confirm the title of Petitioners

to land located in the First Judicial District of Jasper County, Mississippi. Respondents are three classes of claimants to the land or interests therein.

Claimants of the fee title who are Respondents herein are Talmadge D. Lewis and Annie Lewis, his wife, and other members of his family; Mason Newell and other members of the Newell family; Jettie Kelly Windham and George Windham; P. R. Bethea and Emma Bethea; Carrie K. Husband, Norman Husband, her husband and members of their family; Mrs. Florence B. Abney, Mamie M. Abney and members of their families; Cora B. Bradford and Clifton Meyers, together with such of the parties in the Court below as claim title to the surface through conveyances by any of them.

Claimants of an operating leasehold and mineral interests for the exploration for and development and production of petroleum deposits, who are Respondents herein, are the Gulf Refining Company and the Tidewater Associated Oil Company.

Other Respondents are Claudies and Paul Ellis Newell, George D. Leiderman, Rufus William Lewis, Thomas Melvin Lewis, S. J. Hooper, John F. Riddell, Jr., P. C. Morrison, Joseph M. Perkins, C. R. Ridgeway, and various others, all claimants to an interest in the oil and gas in place, or to royalties on the production thereof, and coming within the class or classes represented by them.

OPINION BELOW.

The opinion of the Supreme Court of Mississippi in said case, 30 So. 2d 66 (see also 30 So. 2d 421) and is printed in the Appendix to this Petition, p. 82 et seq.

JURISDICTION.

Jurisdiction of this court is invoked under the provisions of Judicial Code, Section 237 (28 U. S. C. A. 344 (b)). The opinion of the Supreme Court of Mississippi was rendered on the 21st day of April, 1947, and after suggestion of error had been overruled on May 19, 1947, judgment was entered thereon and became final on the 2nd day of June, 1947.

Petitioners come here within the time permitted, contending that they have been denied due process and equal protection of the laws in violation of Article Fourteen of the Amendments to the Constitution of the United States, and that they have been deprived of their rights as citizens of the United States and residents of states other than the State of Mississippi to have their controversy with Respondents adjudicated by the Courts of the United States under the provisions of Article III, Section II, paragraph 1 of the Constitution of the United States, and Section 24(1) of the Judicial Code of the United States (28 U. S. C. 41(1)).

Petitioners contend that they have been denied due process and equal protection by the Courts of Mississippi in the following respects:

They were denied their right to dismiss their suit in the State Court, contrary to the settled rules of State practice.

They were called upon by the State Courts to go to trial in the face of threats and intimidation, under the limited protection of armed guards to be stationed in the courtroom, or to suffer the dismissal of their suit with prejudice to their actions then pending in the Federal Court; and were denied an interlocutory appeal to determine their right to dismiss without prejudice

On the filing of their written protest and objections, and their withdrawal of their appearances in the State Court, said Court, instead of entering decree dismissing their suit with prejudice, which decree would have been final and appealable, entered upon a "trial on the merits" in the absence of Petitioners, putting on proof instead of taking the pleadings as confessed, taking up a cross-bill against Petitioners as to which Petitioners had settled with cross complainants, and which was not triable, and entering a final decree on all issues whether joined or triable, or not.

On Petitioners' appeal to the Supreme Court from the decree of the Trial Court, notwithstanding the appeal was from the trial on the bill and answer, following which the cross-bills were disposed of as having been rendered moot by the trial of the original issues; the Supreme Court considered this situation as being reversed, and dealt with the appeal as if it had been

taken from the failure of the Trial Court to dismiss the cross-bills, although this had not been assigned as error, and no argument had been had thereon, and affirmed the decree of the Lower Court on the theory that the trial was proper on two cross-bills, neither of which was triable according to State practice, one of which had been settled and compromised, and the other of which was not denominated a cross-bill, had not been served as such as required by statute, and had not been dealt with at all by the Trial Court. Petitioners made timely protest to the Supreme Court of Mississippi by Suggestion of Error (substituted for Petition for Rehearing under Mississippi practice) and their protests were overruled.

Petitioners contend that they have been denied their federal rights other than due process and equal protection, by the unseemly rush of the State Courts to adjudicate Petitioners' claims after Petitioners had withdrawn from the State jurisdiction, the violation of settled rules of State practice to reach an adjudication, and the effort to make the action of the State Court binding on the Federal Court, so that under the settled practice and rules of decisions of the latter Courts, Petitioners would be denied a hearing on the merits of their civil actions because of the prior adjudication of their claims by the State Courts.

STATEMENT OF CASE.

Petitioners, the heirs of N. L. Hudson, Sr., deceased, brought suit in the Chancery Court of the First District of Jasper County, Mississippi, to quiet title to three hundred sixty acres of land formerly constituting their homestead. The Defendants (Respondents herein) were five families claiming the fee, Gulf Refining Company claiming an oil and gas lease on three hundred twenty acres and Tidewater Associated Oil Company claiming a similar lease on forty acres and nearly one hundred claimants of royalty interests through said fee claimants. (R. 1-79.)

Practically all of the Respondents filed their answers and Gulf Refining Company filed a cross-bill about a half page long (R. 300, App. 24)[1] in which Gulf sought to do the reverse of what Petitioners were seeking by their bill to do—Gulf sought to confirm the leases which Petitioners were seeking to cancel. Petitioners waived service of the cross-bill and filed a general demurrer thereto (R. 398-9, App. 24-7) setting up that the cross-bill was nothing but a defense to the original bill and sought no relief except such as could be granted under the answer of Gulf. Certain royalty claimants known as the "Ridgeway Group" filed a like cross-bill (R. 452, App. 28-30) but this cross-bill was never served and was not referred to in the decree of the Chancery Court.

Pleadings were filed (R. 119, 202, App. 156) by certain Respondents in which the court was advised that Re-

[1] Petitioners have printed an Appendix in which such portions of the record are set forth as are considered necessary to consideration of the questions raised by this Petition. The record is very voluminous and it is suggested that statements of fact be subject, in every instance, to the test of reference to the record.

spondents Claudies Newell and Paul Ellis Newell, minors, had not been legally served with process and were absent from the United States as members of the armed services, and praying that proceedings be stayed until the end of their military service under the Soldiers and Sailors Civil Relief Act of 1940.

On December 15, 1944, Petitioners settled their suit with Gulf Refining Company by executing an oil and gas lease covering the same lands and containing substantially the same terms as the leases Gulf had from the other fee claimants. (R. 755, App. 42.) On December 11, 1945, Petitioners, being non-residents of Mississippi, filed four Civil Actions on the same cause of action in the United States District Court for the Eastern Division of the Southern District of Mississippi against most of Respondents (R. 795, 807, 821, 837) and immediately filed their motion to dismiss their State Court suit without prejudice (R. 605, App. 30).

Practically all of the Respondents except Gulf Refining Company filed written objections to the dismissal (R. 606, 640, 661, 678, 695, 713, App. 30, 38) based on the allegations that Petitioners had unreasonably delayed the progress of the Chancery Court action and had obtained an unconscionable advantage by addressing interrogatories to certain parties; that Petitioners had given a lease to Gulf Refining Company under the terms of which the Chancery Court of Jasper County was constituted the sole forum for the trial of the issues involved in the suit; and that Gulf was holding up the payment of oil royalties to the fee and royalty claimants because of the pendency of the suit.

Respondent, Gulf Refining Company, did not file any answer to the Motion to Dismiss and did not offer any objection to the dismissal and, although its attorneys were present in court when the motion came on for hearing (R. 753-4) they did not offer any evidence or call up their cross-bill or participate in the hearing or offer any objection to the granting of the Motion to Dismiss.

At the hearing on the Motion to Dismiss (R. 755-850, App. 41-62) Respondents other than Gulf introduced evidence in an effort to sustain the position taken in their said answers, and Petitioners introduced copies of the complaints they had filed in the United States District Court. The Chancery Court entered an order overruling the Motion to Dismiss without prejudice (R. 721), and Petitioners filed their application for an interlocutory appeal as provided by Mississippi practice and the chancellor refused to allow the appeal (R. 722-3) whereupon they applied to a judge of the Supreme Court of Mississippi (R. 1326) and such appeal was also denied by that court.

Notwithstanding the refusal of the Chancery Court to permit them to dismiss their suit or to appeal to settle the principles of the case, Petitioners proceeded with diligence to prosecute their Federal actions. All of the Respondents, Defendants in those actions, had filed motions to dismiss and pleas in abatement and, after extended hearings, the Federal Court had overruled said motions and pleas (R. 726, 734, App. 67); Petitioners had also defeated efforts to prevent the taking of depositions and had, in the Federal Court, taken their depositions and Respondents had also taken depositions and had addressed

more than four hundred pages of interrogatories to Petitioners (R. 727, App. 68); and the Federal Court actions had been brought to the point where they were ready for trial on the merits (R. 726 et seq., App. 69) and a trial on the merits was to be had promptly.

The issues in the Federal Court actions had been expanded beyond those of the State Court case, to include the reformation of the lease the Petitioners had given Gulf (R. 726, App. 67).

On March 15, 1946, the Federal Court entered its order (R. 734) overruling all of the Motions to Dismiss and Abate filed by Respondents in those actions thus clearing the way for trial on their merits and eleven days later the judge of the Chancery Court addressed a letter to all of the solicitors for the parties advising that he was calling a special term of the Chancery Court of Jasper County at which this case would be triable (R. 730, App. 63). The body of this letter is quoted here:

"In Re: N. L. Hudson, et al.,
vs. #398.
Gulf Refining Company, et al.
First District, Jasper County.

"Gentlemen:

"I have called a special term of the Chancery Court of the First District of Jasper County beginning the first Monday in May. The above case will be triable at that term.

"It has come to my knowledge that certain parties interested in the case have made threats against certain litigants, witnesses and attorneys. Of course, I

have no personal knowledge that any such threats have been made. But it is my duty, as I see it, to see that all officers of the court, litigants and witnesses are protected.

"Section 4240 of the Code of 1942 requires the Sheriff to attend all sessions of the court 'with a sufficient number of deputies or bailiffs'. I am directing the Sheriff to appoint 12 deputies from the western part of Jasper County, men of character and courage, to attend the special term of court, and it is my purpose to require the Sheriff and his deputies to search every person who comes into the court room. I want every one who is connected with this case to understand that it is my purpose to see that they are protected while attending court.

"I am writing you confidentially for the reason that I do not care that any notice be given of this action to the public.

"If you have any suggestions to make I will be glad to hear from you."

Petitioners, appearing specially, filed their written objection to any further hearing or step in the Chancery suit (R. 724-749, App. 64) claiming that their motion to dismiss without prejudice had divested the court of jurisdiction and exhibiting copies of their complaints and amendments in the Federal actions, and advising that the Federal Court had assumed jurisdiction and overruled Motions to Dismiss and that the Federal actions were at issue and ready for prompt trial (R. 726 et seq., App. 67 et seq.) and pleading with the Chancery Court not to force them to trial under the conditions set forth in the chancellor's letter but to permit them to proceed to trial in their

Federal actions where they were (R. 728, App. 69) "free of any atmosphere of threats, intimidation, or oppression, and under such circumstances that the witnesses and all who engage in the trial may perform their respective parts without fear of violence and without intimidation or oppression". In their written objection Petitioners stressed their reliance on their Constitutional right to proceed with their Federal Court actions and their contention that the Chancery Court would deny them due process of law and the equal protection of the laws under the Constitution of the United States if it should proceed with the hearing under the circumstances there set forth.

Respondents (R. 856-9, App. 72-5) took the position that the Chancery Court had exclusive jurisdiction and that the United States District Court did not have any jurisdiction to proceed with the cases and the chancellor, accepting that view, announced that he would proceed with the trial of the case.

Under Mississippi practice, Petitioners would waive the error of the Chancery Court in denying them the right to dismiss if they participated in the subsequent hearing and, to avoid such a waiver and the threats and trial under armed guards, Petitioners stood on their Federal Rights pressed before the court and withdrew and declined to proceed further in the Chancery case. The various Respondents proceeded to a "hearing on the merits" and introduced evidence covering three hundred eighty-two pages (R. 859-1241). The taking of testimony had been begun at one thirty p. m. May 6th and was entirely completed and the decree prepared and signed on that day

(R. 859, 749A-749C) although the decree was not filed until May 7th. On the same day, the special term of Court was adjourned (R. 1246).

The final decree (R. 749 A-C, App. 76) does the following things in the order named: finds that the complainants (Petitioners) are not entitled to any relief and dismisses the original bill and all amendments thereto with prejudice, overrules the demurrer of the complainants (Petitioners) to the cross-bill of Gulf, adjudges that Gulf is entitled to the relief prayed for in its cross-bill including confirmation of its leases from Respondent fee-claimants and cancelling the claims of Petitioners to the "lands covered by said leases" and adjudges that Gulf does not owe Petitioners any royalties.

No separate or preliminary hearing was had on Petitioners' demurrer to Gulf's cross-bill and no separate decree was rendered on it and no notice was given Petitioners that the cross-bill was overruled and no opportunity was given them by the decree or otherwise to file an answer to the cross-bill. Gulf did not amend its cross-bill to show that it had settled with Petitioners by accepting an oil and gas lease from them.

Petitioners appealed to the Supreme Court of Mississippi and in their assignment of errors set forth their reliance on their Constitutional rights theretofore raised by them (R. 1249, App. 79). The Supreme Court of Mississippi entered its order affirming the decree of the lower court (R. 1251), and filed its written opinion on which its judgment was based (R. 1252, App. 82). The

affirmance of the decree of the lower court was based entirely upon the cross-bill of Gulf and the cross-bill of the Ridgeway group, it being held that the decision on these cross-bills was *res judicata* of all of the issues between all of the parties, thus making moot the question of whether Petitioners had the right to dismiss without prejudice (R. 1257, App. 87).

In their suggestion of error (equivalent to Petition for Rehearing), Petitioners challenged the decision and opinion of the Supreme Court of Mississippi and reaffirmed their contention that the actions of the lower court affirmed by the Supreme Court took their property without due process of law, and denied other rights steadfastly claimed by them throughout the proceeding under the Constitution of the United States (R. 1301, 1314-1318). They further set up the claim that the Supreme Court disposed of the case on a question not raised in or decided by the court below or argued in the Supreme Court (R. 1317) and reiterated their reliance on their Constitutional Rights as claimed by them through the proceedings. The Supreme Court of Mississippi promptly overruled their suggestion of error (R. 1331). Later that court overruled their motion to correct the judgment and the judgment of the Supreme Court of Mississippi became final on June 2, 1947 (R. 1332).

From these judgments and decisions Petitioners seek relief from this court by grace of Certiorari, based on the claim that the action of the trial court in refusing to grant them their absolute right to dismiss in order that they might proceed to judgment in their Federal actions and in proceeding to judgment on the cross-bills in direct

disobedience to the Mississippi rules of practice without giving them opportunity to plead to or defend said cross-bills; and the action of the Supreme Court of Mississippi, in deciding the case on questions not presented to the trial court or argued before it and in holding the judgment between Petitioners and Gulf to be *res judicata* as to the issues not involved in, and as to litigants not parties to, the cross-bills, took their property without due process of law and denied to them the equal protection of the laws.

Since the moment they filed their Motion to Dismiss without prejudice, Petitioners have placed their sole reliance on the Constitutional Rights they asserted at every stage of the State Court proceeding. Neither the trial court nor the Supreme Court of Mississippi noticed or referred to the Federal questions raised and apparently neither court gave these Federal questions any consideration whatever.

QUESTIONS PRESENTED.

I.

Under the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States:

A. Did the action of the trial court in requiring Petitioners, being non-residents of Mississippi, to proceed with the trial in the presence of armed guards and under the

circumstances prevailing, or suffer the dismissal of their suit with prejudice, amount to a denial of rights claimed by Petitioners under those clauses?

B. Was the denial of Petitioners' motion to dismiss without prejudice, and the subsequent dismissal of their suit with prejudice, where they had withdrawn their voluntary appearance and had not been served with process on any complaint against them by any party with whom they had any controversy, and no substantive right had accrued from the bringing of the suit, a denial of these rights?

C. Did the requirement that Petitioners, being non-residents who were asserting their rights to sue in the Federal Court, withdraw and permit final decree against them in order to preserve their exception to the action of the court in denying their motion to dismiss without prejudice, leaving no remedy to Petitioners except by appeal, amount to a denial of those rights?

D. Where Petitioners had withdrawn to protect their right to dismiss without prejudice and avoid threats and trial under armed guards and to prosecute their Federal actions, and where, if the trial court had correctly denied their motion it should have dismissed their bill with prejudice, can the court take any other action that would be binding on Petitioners except dismissal with prejudice, without denying to them those rights?

E. Where the Supreme Court of Mississippi holds the rights of Petitioners to have been adjudicated under a

cross-bill which had never been served as required under Mississippi practice, have those rights been denied?

F. Where said Supreme Court treats a trial on the merits of issues made on bill and answer as if it had been a trial on a cross-bill to which Petitioners had demurred and would, under local practice, have a reasonable time to answer if demurrer overruled, and affirms the decree dismissing the original bill on the theory that the action of the trial court, when considered as having been taken on the cross-bill, renders the issues made on bill and answer moot even thorugh no decree *pro confesso*, as required by state practice, or other default, was entered against Petitioners, have Petitioners been denied those rights?

G. Where said Supreme Court decides that the decision on a cross-bill between Petitioners and certain respondents was *res judicata* as to nearly one hundred respondents not parties to the cross-bill and as to issues not raised by the cross-bill, have those rights been denied?

H. Where said Supreme Court decided that a decision on a cross-bill between Petitioners and certain respondents was *res judicata* of all issues between Petitioners and other respondents, and those issues were not the same, and that question had not been raised in the trial court and Petitioners had not been given opportunity to meet it, have those rights been denied?

I. Where said Supreme Court decides that a decision under cross-bills is *res judicata* of rights as between

Petitioners and respondents not parties to the cross-bills and as to issues not involved therein, and the decision was not based on any issue presented to the Supreme Court by any party, are Petitioners denied those rights?

J. Where issues had been tried on bill and answer when the bill would have been dismissed on Petitioners' refusal to proceed after denial of their motion to dismiss without prejudice, does the affirmance of the decree by the Supreme Court on the theory that the same trial might have been had on a cross-bill actually on file, but not made the basis for any issues on the trial, deny to Petitioners those rights?

K. Where one respondent files a cross-bill and thereafter settles with Petitioners the matters at issue in said cross-bill and thereafter proceeds on *ex parte* hearing to judgment on said cross-bill without amending to show such settlement or giving Petitioners opportunity to plead such settlement in defense to such cross-bill, have Petitioners been denied such rights?

L. Did the entry of the final decree granting the prayer of the cross-bill as to which Petitioners had demurred, where Petitioners were not afforded any opportunity to be heard on their demurrer or to plead to the cross-bill, amount to a denial of those rights?

M. Did the action of the court in entering a decree against Petitioners on a cross-bill against them as to which they were entitled to a reasonable time to answer if their demurrer should be overruled, amount to a denial of those rights?

N. Did the overruling of Petitioners' demurrer after their withdrawal, and without notice to them that it would be acted on, amount to a denial of those rights, and did the entry of a final decree without the entry of any default against Petitioners, or the taking of the cross-bill as confessed, as required by state practice, amount to a further denial of those rights?

II.

Under Article III, Section II, Paragraph 1 of the Constitution of the United States, empowering Congress to provide for jurisdiction in United States Courts in diversity cases; and under Judicial Code, Section 24 (1) (28 U. S. C. A. 41 (1)); and under the due process and equal protection clauses of the Fourteenth Amendment:

A. Does a State Court have jurisdiction and authority to deny to Petitioners the right to dismiss without prejudice to their actions in the United States District Court, where no substantial right has accrued in the State Court?

B. Where Petitioners have done all in their power to dismiss without prejudice and were entitled to do so under state practice, does the State Court have power and jurisdiction to render a decree against them and make said decree operate as an adjudication of the issues made and being tried in the Courts of the United States?

C. Where Petitioners, being non-residents, have reasserted their claims in civil actions in the United States Court, and have moved to dismiss their suits on the same

claims in the State Courts, may the State Courts depart from the established state practice to render a final decree against Petitioners, and make its decree binding on the United States Court?

D. Where the Chancery Court of Jasper County and the Supreme Court of Mississippi failed to follow established procedure under the law of said State in the particulars set forth in this Petition did this failure deny to Petitioners, citizens of other states, rights accruing to them as citizens of the United States?

E. Where Petitioners, citizens of other states, claimed that the actions of the State Courts as set forth in this Petition denied their rights under the Constitution and laws of the United States, and the State Courts refused to notice or mention or recognize their claims, and the actions and judgments of the State Courts prevent Petitioners from presenting the merits of their case, are they unconstitutionally denied their rights to an adjudication, as citizens of the United States?

F. Could the State Court require Petitioners to proceed with the trial of their suit under armed guards, where they had elected to withdraw from the State Court and prosecute their claims in the Federal Court, and on their refusal to proceed in the State Court under such circumstances, enter any decree against them which would prejudice their claims in the Federal Court?

STATUTES INVOLVED.

The statutes involved are the due process and equal protection clauses of Article XIV of the Amendments to the Constitution of the United States; Article III, Section II, paragraph 1 of the Constitution of the United States, and Section 24 (1) of the Judicial Code of the United States (28 U. S. C. A. 41 (1)).

SPECIFICATION OF ERRORS.

Petitioners claim that the judgment of the Chancery Court of Jasper County, Mississippi, affirmed by the Supreme Court of Mississippi, denied Petitioners due process of law and the equal protection of the laws in contravention of the Constitution of the United States and particularly Article III, Section II, paragraph 1 (and Judicial Code, Section 24 (1)), and Article XIV, Section I of the Amendments to the Constitution of the United States, the benefit of which was expressly claimed by Petitioners throughout the trial, in the following particulars and the following acts, to-wit:

1. In denying Petitioners their absolute right to dismiss their cause without prejudice, particularly when they were diligently pursuing their actions theretofore brought in the United States District Court pursuant to Section 24 (1) of the Judicial Code.

2. In refusing to grant interlocutory appeal to Petitioners and forcing them to go to trial in the presence of

threats and under armed guard or waive their right to prosecute their suit in person or by counsel.

3. In requiring Petitioners to forego their right to prosecute their suit in person and by counsel, or waive their right to except on appeal to the action of the court in denying their motion to dismiss without prejudice.

4. In calling a special term of court and requiring Petitioners and their witnesses and solicitors to submit to search and to go to trial in an atmosphere of threats and intimidation at a time when said state court was advised that Petitioners had pressed their Federal Court Actions to the point of early trial; and in denying comity to the Federal Court and in refusing to consider or honor the objection of Petitioners setting up their reliance on their Constitutional rights; and in refusing to sit as a Federal Court in the consideration of said Federal Rights relied on by the Petitioners.

5. In holding that the State Court had exclusive jurisdiction to try the issues of the case and refusing to give consideration to Petitioners' asserted Federal Rights.

6. In failing and refusing to pass upon Federal Rights claimed and asserted by Petitioners and in treating the case as if no Federal question was involved.

7. In proceeding to trial when the case was not triable because all parties were not before the court and because two indispensable parties were minors and had not been served with process and were absent from the United

States in its military service, according to pleadings filed in the State Courts claiming, in their behalf, the right to have the suit stayed under the Federal Soldiers and Sailors Relief Act of 1940, (50 U. S. C. A. App. 501 et seq.).

8. In proceeding to trial and judgment on cross-bill which were, on their face, inadequate to support the relief granted.

9. In proceeding to trial on cross-bill which was never served and when Petitioners did not have legal notice that said cross-bill would be acted on.

10. In proceeding to trial on the merits on a cross-bill to which a general demurrer had been interposed without first passing on demurrer.

11. In proceeding to trial on a cross-bill without giving Petitioners time or opportunity to plead after their demurrer to the cross-bill had been overruled.

12. By awarding judgment against Petitioners on a cross-bill for their failure to defend said cross-bill when they were never provided a chance to contest with complainants on said cross-bill.

13. By awarding a decree against Petitioners on a cross-bill against them as to which they had not been given an opportunity to answer as to the merits, and without adjudicating them to be in default, or to have confessed the allegations against them as required by state practice.

14. By the decision of the case by the Supreme Court of Mississippi on a point never presented to or passed on by the lower court or argued in the Supreme Court and which Petitioners never had an opportunity to be heard in either court.

15. By holding that the claim of Petitioners to the right to dismiss their suit in the state court in order to prosecute their actions in the Federal Court was a moot question.

16. In awarding judgment against Petitioners on the cross-bill of Gulf Refining Company after Petitioners and Gulf Refining Company had settled the suit as between them which settlement Gulf Refining Company did not plead or call to the attention of the court awarding said judgment.

17. In holding and decreeing that a judgment against Petitioners on the cross-bill of Gulf Refining Company was *res judicata* as between Petitioners and more than one hundred defendants not parties to said cross-bill and as to issues not raised or passed on in said cross-bill.

18. In affording Respondents the opportunity to plead the judgment of the Chancery Court of Jasper County and affirmed by the Supreme Court of Mississippi as *res judicata* of the actions brought and prosecuted by Petitioners in the United States District Court.

REASONS FOR ALLOWANCE OF WRIT.

The Supreme Court of Mississippi has decided Federal questions of substance not heretofore decided by this Court, and has decided Federal questions in a way not in accord with the applicable decisions of this Court, all as above set forth and as argued in Petitioners' Brief.

Petitioners have not had their day in court. They stand denied by the State Courts of Mississippi a trial on the merits of their claim, with the manifest purpose on the part of Respondents of attempting to plead the State Court judgments as *res judicata* of their Federal Actions. And they stand thus committed by the Mississippi Courts without the scantest notice of their Constitutional Rights which they urged before said Courts at every step in the proceedings.

Petitioners entered voluntarily into the Courts of Mississippi and spent much time, money and effort in the attempt to get their grievances fairly tried on their merits. When it seemed that a fair trial, as recognized by this Court, could not be had, they availed themselves of their Constitutional Right to enter the Federal Court and simultaneously availed themselves of their undoubted right to dismiss the State Court case they had begun. The trial court would not accord them the right to dismiss given them by Mississippi Statutes and court decisions, and later assumed to be their right by the Supreme Court decision. Nor would the trial court nor the Supreme Court of Mississippi grant them interlocutory appeal provided for by Mississippi Statutes to the end that their vital

right to dismiss might be authoritatively settled without the necessity of Petitioners risking the drastic alternative of dismissal with prejudice according to Mississippi practice.

Petitioners nevertheless proceeded diligently with their Federal Court actions and had brought them to the point of immediate trial when the State Court called a special term of court and invited Petitioners to a trial under conditions of tension which would have made a fair trial impossible. When Petitioners filed their written objections setting forth fully their Constitutional Rights and plead with the trial court for the privilege of pursuing their Federal actions, the trial court would not give their pleas the scantest notice.

When Petitioners declined to proceed further the trial court, instead of merely dismissing their bill with prejudice as provided by Mississippi practice, proceeded to a "trial on the merits" on bill and answers and further assumed to adjudicate Gulf Refining Company's cross-bill without any preliminary hearing on Petitioners' demurrer to the cross-bill.

Instead of sustaining the demurrer to the cross-bill, the trial court overruled it. Instead of providing in the order overruling the demurrer that Petitioners should have a reasonable time to plead, as required by Mississippi practice (upon the filing of which pleading by Petitioners the case would not have been triable for at least thirty days), the trial court moved, without pausing and in one continuous hearing, to a final decree adjudicating the issues

of the cross-bill in favor of Gulf Refining Company. Although Petitioners had settled with Gulf, this settlement was not set up in an amendment to Gulf's cross-bill, and Petitioners were not given the opportunity to plead the settlement.

In their appeal to the Supreme Court Petitioners urged their reliance on the rights given by the Constitution of the United States, but the Supreme Court did not mention these Constitutional Rights. In affirming the decree of the trial court the Supreme Court of Mississippi passed over as moot the vital right of Petitioners to dismiss without prejudice and to have the trial court proceed no further than to dismiss their bill with prejudice upon their declining to proceed, and decided the case on the cross-bills alone, which under Mississippi practice were never properly reached by the court below. It failed to take notice that Petitioners and Gulf and settled their controversy, and that the case as between them was moot.

The Supreme Court of Mississippi went much further than that. It predicated an affirmance of the judgment of the lower court on the Ridgeway cross-bill, which had never been served at all and which had never been noticed in any pleading. It held that the decree on Gulf's cross-bill, involving only a limited leasehold interest, adjudicated all of the issues between the Petitioners and the claimants of the fee in the land and of the large number of claimants of various mineral interests, none of whom were parties to the cross-bill. That was an issue not raised by any party, not considered by the trial court, and brought into the case entirely by the Supreme Court

of Mississippi without the benefit of argument and without opportunity to Petitioners to present their contentions with respect to it. In their Supggestion of Error Petitioners urged that such a course violated their Constitutional Rights. Despite the constant urging by Petitioners of their Constitutional Rights the Supreme Court of Mississippi did not notice or mention the pendency of the Federal Court cases, or the presence of any Federal question.

The case thus made has an importance for transcending the interests of Petitioners, great as they are. They have been denied their day in court to assert property rights of enormous value, but the public, too, has a definite stake in the case. It is important that citizens of the several States know, when they are put to the necessity of litigating in other States, whether their Constitutional Rights will be protected; or whether State Courts will be permitted to deny those rights by ignoring them.

Moreover, it is of the utmost importance that this Court determine at what point before the actual satisfaction or final denial of the claim of a litigant in a State Court, the litigant may rescind his action in entering his appearance in the State Court and invoke the diversity jurisdiction of the United States Court. Related questions as to whether motives and circumstances may be considered in determining if State Court action may bar resort to Federal jurisdiction, and if so, whether threats of violence and efforts at intimidation, noticed by the State Court to the extent that it orders the trial to proceed under armed guards in a remote rural community, are such circum-

stances as would require the intervention of Federal jurisdiction, remain unanswered in the jurisprudence of this Court. If this Court should hold that the foregoing matters are to be determined by state law and procedure, then this Court should indicate whether and to what extent it will intervene to determine whether or not federal rights have been violated.

CONCLUSION.

Wherefore, Petitioners pray that this Honorable Court may issue a writ of Certiorari to the Supreme Court of Mississippi to review the judgment and decision in this case, and that said judgment and decision may be reversed and that Petitioners may be accorded their right to dismiss their State Court action without prejudice and permitted to pursue their Federal Court actions; and that full justice may be granted to Petitioners according to law.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. .....

N. L. HUDSON, ET AL.,
Petitioners,

versus

GULF REFINING COMPANY, ET AL.,
Respondents.

BRIEF OF ARGUMENT.

A.

IT IS DUTY OF STATE COURT TO ENFORCE RIGHTS UNDER THE FEDERAL CONSTITUTION. (P. 40.)

Angel v. Bullington, L. Ed. Advance Opinions March 10, 1947, p. 557.
Smith v. O'Grady, 312 U. S. 329, 85 L. Ed. 861.
United States v. Bank of New York & Trust Co., 296 U. S. 463, 80 L. Ed. 331.
Robb v. Connolly, 111 U. S. 624, 38 L. Ed. 542.
McKnett v. St. Louis, etc. Co., 292 U. S. 230, 78 L. Ed. 1227.
Postal, etc. v. Newport, 247 U. S. 464, 62 L. Ed. 1215.
Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791.
Crescent City, etc. Co. v. Butcher's Union, 130 U. S. 141, 30 L. Ed. 614.

B.

THIS COURT HAS FINAL SAY WHERE CLAIM IS BASED ON DENIAL OF CONSTITUTIONAL RIGHTS. (P. 41.)

Titus v. Wallick, 306 U. S. 282, 83 L. Ed. 653.
Angel v. Bullington, L. Ed. Advance Opinions March 10, 1947, p. 557.
Broderick v. Rosner, 294 U. S. 629, 79 L. Ed. 1100.
Irving Trust Co. v. Day, 314 U. S. 556, 86 L. Ed. 452.
Minnesota v. National Tea Co., 309 U. S. 551, 84 L. Ed. 920.
Radio Station v. Johnson, 326 U. S. 120, 89 L. Ed. 2092.
Domorest v. City Bank, 321 U. S. 36, 88 L. Ed. 526.
Pennsylvania General Casualty Co. v. Pennsylvania, 294 U. S. 189, 79 L. Ed. 850.
Steele v. L. & N. R. R. Co., 323 U. S. 192, 89 L. Ed. 173.
Toucy v. New York, etc. Co., 314 U. S. 118, 86 L. Ed. 100.
Lovell v. City of Griffin, 58 S. Ct. 666, 82 L. Ed. 949.
Schuylkill, etc. Co. v. Commonwealth, 296 U. S. 113, 80 L. Ed. 91.
Milkwagon Drivers, etc. v. Meadowmoor Dairies, 312 U. S. 715, 85 L. Ed. 1145.
Chambers v. State, 309 U. S. 227, 84 L. Ed. 716.
United Gas, etc. Co. v. State of Texas, 303 U. S. 123, 82 L. Ed. 702.
Chicago, etc. Co. v. Rambo, 298 U. S. 99, 80 L. Ed. 1066.

C.

PETITIONERS CONTEND THAT THEY HAVE BEEN DENIED DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS, AND RIGHTS ACCRUING TO THEM UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES, BY THE ACTS AND DECISIONS OF THE STATE COURTS OF MISSISSIPPI. (P. 43.)

I. In Overruling Petitioners' Motion to Dismiss Without Prejudice. (P. 44.)

Mississippi Code of 1942, Sections 1538, 1539.
Chicago, etc. Co. v. Union, etc. Co., 109 U. S. 702, 27 L. Ed. 1081.
State v. Hemmingway, et al, (Miss. 1891) 69 Miss. 491, 10 So. 575.
Canadian, etc. Co. v. Fitzpatrick, (1893) 71 Miss. 350, 14 So. 270.
Russell v. Denson, (1911) 98 Miss. 862, 54 So. 439.
Adams v. Lucedale, etc. Co., (1917) 113 Miss. 608, 74 So. 435.
Griffith's Mississippi Chancery Practice, 534.

II. In Denying Interlocutory Appeal to Settle Petitioners' Right to Dismiss and Calling a Special Term and Forcing Petitioners to Go to Trial in the Face of Threats and Armed Guards When Petitioners Were Insisting on Their Constitutional Rights and Their Right to Pursue Federal Actions Free From Threats and Intimidation. (P. 48.)

Mississippi Code of 1942, Sections 1148, 1217, and 1957.
Mitchell et al v. Film Transit Co. et al (1934) 194 Miss. 550, 13 So. (2d) 154.

Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543.
Fisher v. State, 145 Miss. 116, 110 So. 361.
Hebert v. Louisiana, 272 U. S. 312, 71 L. Ed. 270.
Snyder v. Massachusetts, 291 U. S. 96, 78 L. Ed. 674.
Rogers v. Peck, 199 U. S. 425, 50 L. Ed. 256.
Brown v. Mississippi, 297 U. S. 278, 80 L. Ed. 682.
Angel v. Bullington, L. Ed. Advance Opinions March 10, 1947, p. 557.
Harrison v. St. L. & S. F. Railroad Co., 232 U. S. 318, 58 L. Ed. 621.
Missouri, etc., Co. v. Larabee, 234 U. S. 459, 58 L. Ed. 1398.
Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.
Donald v. Philadelphia, etc. Co., 241 U. S. 329, 60 L. Ed. 1027.
Terrell v. Burke, etc. Co., 257 U. S. 529, 66 L. Ed. 352.
New York, etc. Co. v. Head, 234 U. S. 149, 58 L. Ed. 1259.
United States v. Bank of New York, 296 U. S. 463, 80 L. Ed. 331.
Commonwealth v. Williams, 294 U. S. 176, 79 L. Ed. 841.
Markham v. Allen, 326 U. S. 490, 90 L. Ed. 256.

III. In Proceeding to Judgment Against Petitioners on Ex Parte Hearing at a Time When the Case Was Not Triable Because of the Absence of Necessary Parties. (P. 56.)

Mississippi Code of 1942, Sections 1314, 1323.
Paepcke Leicht Lbr. Co. v. Savage, 137 Miss. 11, 101 So. 709.
Smith v. Denny, 90 Miss. 34, 43 So. 479.
Lamar Life Ins. Co. v. Billups, 175 Miss. 771, 169 So. 32.
Dorsey, et al v. Sullivan, 24 So. (2d) 852.
Griffith's Mississippi Chancery Practice, Sections 263 and 556.

IV. In Proceeding to a "Trial on the Merits", Including Decree on Cross-Bill, When Mississippi Practice Permitted Only Dismissal With Prejudice After Petitioners Declined to Proceed Further. (P. 58.)

Mitchell v. Film Transit Co., 194 Miss. 550, 13 So. (2d) 154.
Baird v. Bardwell, et al, 60 Miss. 164.
Griffith's Mississippi Chancery Practice, Pars. 538 and 562.

V. In Awarding Judgment Against Petitions on the Cross-Bill of the Ridgeways. (P. 60.)

Mississippi Code of 1942, Section 1296.
Majure v. Johnson, et al, 192 Miss. 810, 7 So. (2d) 545.
Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791.
Brinkerhoff, etc. Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107.
American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231.
Chase National Bank v. Norwalk, 291 U. S. 431, 78 L. Ed. 894.

VI. In Proceeding to Judgment on Gulf's Cross-Bill Without Giving Petitioners the Opportunity to Answer and Defend it After the Demurrer to the Cross-Bill Was Overruled and When Petitioners Had Settled With Gulf. (P. 62.)

Mississippi Code of 1942, Sections 1240, 1241, 1244, 1286, 1289, 1296, 1297, 1298, 1310.
19 American Jurisprudence, Equity, Paragraph 318, page 227.
Thomas v. Worcester, 114 U. S. 104, 29 L. Ed. 105.
Hovey v. Elliott, 167 U. S. 409, 418, 42 L. Ed. 215.

Malinsky v. People, 321 U. S. 401, 89 L. Ed. 1029.
Titus v. Wallick, 306 U. S. 282, 83 L. Ed. 653.
Hooven, etc. Co. v. Evatt, 324 U. S. 652, 89 L. Ed. 1252.
Schuylkill Co. v. Commonwealth of Pennsylvania, 296 U. S. 113, 80 L. Ed. 91.
Lawrence v. State Tax Commission, 286 U. S. 276, 79 L. Ed. 1102.
Ancient, etc. Order v. Michaux, 2799 U. S. 737, 73 L. Ed. 931
Southern Pacific Co v. State, ex rel, 325 U. S. 761, 89 L. Ed. 1915.
United States Gas. etc. Co. v. Texas, 303 U. S. 123, 82 L. Ed. 702.
Chicago, etc. Co. v. Rambo, 298 U. S. 99, 80 L. Ed. 1066.
Williams v. State of North Carolina, 325 U. S. 226, 89 L. Ed. 1577.
Adam v. Saenger, 303 U. S. 59, 82 L. Ed. 649.
International Harvester Co. v. Wisconsin, 322 U. S. 435, 88 L. Ed. 1373.
Chase National Bank v. Norwark, 291 U. S. 431, 78 L. Ed. 894.
American Surety Co. v. Baldwin, 287 U. S. 156. 77 L. Ed. 231.

VII. In Awarding Judgment Against Petitioners and in Favor of Gulf Refining Company in a Case Not Justiciable Because it Had Become Moot. (P. 71.)

American Wood Paper Co. v. Heft, 8 Wall. 333, 19 L. Ed. 379.
South Spring, etc. Co. v. Amador, etc. Co., 145 U. S. 300, 36 L. Ed. 712.
Dakota County v. Glidden, 113 U. S. 222, 28 L. Ed. 981.
California v. San Pahlo, etc. Co., 149 U. S. 308, 37 L. Ed. 747.

Mills v. Green, 159 U. S. 651, 40 L. Ed. 293.
Natural Milk Products Association v. San Francisco, 317 U. S. 423, 87 L. Ed. 375.
C. I. O. v. McAdory, 325 U. S. 472, 89 L. Ed. 1741.

VIII. In Awarding Judgment Against Petitioners on Cross-Bills which on their Face Showed No Right to Relief and to Which a Demurrer Had Been Interposed. (P. 74.)

Mississippi Code of 1942, Section 1325.
Griffith's Mississippi Chancery Practice, Paragraphs 379, 380 and 384.
Buckingham v. Wesson, (1877) 54 Miss. 526.
Vaughan v. Hudson, (1882) 59 Miss. 421.
Carter v. Harvey, (1890) 7 So. 286.
Hinds, et al v. Martin (C. C. A. 5, 1923) 286 Fed. 653.
30 Corpus Juris Secundum, page 788.
Ayres v. Carver, 58 U. S. 591, 15 L. Ed. 179.
Providence, etc. Co. v. Goodyear, 76 U. S. 807, 19 L. Ed. 587.
Ayres v. Chicago, 101 U. S. 184, 25 L. Ed. 838.
Miller, et al v. Ricky, 218 U. S. 258, 54 L. Ed. 1032.
Moore v. New York, etc. Exchange, 270 U. S. 593, 70 L. Ed. 750.
Ladner v. Ogden, (1856) 31 Miss. 332.
Gilmer v. Felhour, (1871) 45 Miss. 627.
Thomason v. Neely, (1876) 50 Miss. 310.
Belcher v. Wilkerson, (1877) 54 Miss. 677.
Jacks v. Bridwell, (1876) 51 Miss. 881.
DeWeese v. DeWeese, (1877) 55 Miss. 315.
Sigman v. Lundy, (1889) 66 Miss. 522, 6 So. 245.
Dows v. The City of Chicago, 11 Wall. 108, 20 L. Ed. 65.
Holgate v. Eaton, 116 U. S. 33, 29 L. Ed. 538.
California, etc. Co. v. United States, 192 U. S. 355, 48 L. Ed. 476.

Eustice v. Holmes, 52 Miss. 314.
Russell v. Hickory, 116 Miss. 46, 76 So. 825.
Longmeyer v. Mars, 124 Miss. 77, 86 So. 753.
Eastman v. Wyatt Lbr. Co., 102 Miss. 313, 59 So. 93.
Lyon Co. v. Ratliff, 129 Miss. 342, 92 So. 229.

IX. By The Decision of the Supreme Court of Mississippi on a Point Never Presented to or Passed on by the Lower Court and Which Petitioners Never Had a Chance to Defend. (P. 87.)

Davis v. Wechsler, 263 U. S. 22, 68 L. Ed. 143.
Angel v. Bullington, L. Ed. Advance Opinions March 10, 1947, p. 556.
Saunders v. Shaw, 244 U. S. 317, 61 L. Ed. 1163.
Myles Salt Co. v. Iberia, etc. District, 239 U. S. 478, 60 L. Ed. 392.
Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. Ed. 1027.
Helis v. Ward, 308 U. S. 365, 84 L. Ed. 327.
Brinkerhoff o. v. Hill, 281 U. S. 673, 74 L. Ed. 1107.
Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791.
Roller v. Holly, 176 U. S. 520, 44 L. Ed. 520.
American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231.
Georgia Railway, etc. Co. v. City of Decatur, 294 U. S. 165, 79 L. Ed. 1365.

X. By the Decision of the Supreme Court of Mississippi Affirming a Judgment Against Petitioners on the Cross-Bills of Gulf Refining Company and the Ridgways Holding Said Judgment to be Res Judicata as Between Petitioners and the Defendants Not Parties to Said Cross-Bills and as to Issues Not Involved in Said Cross-Bills, and When This Point Was Not Involved in the Decision of the Lower Court or Argued Before Said Supreme Court. (P. 95.)

Hansberry v. Lee, 311 U. S. 32, 85 L. Ed. 22.

Riley, et al v. New York Trust Co., 315 U. S. 343, 86 L. Ed. 885.

Postal, etc. Co. v. Newport, 247 U. S. 464, 62 L. Ed. 1215.

Chase National Bank v. Norwalk, 291 U. S. 431, 78 L. Ed. 894.

Van Zandt v. Town of Braxton, 149 Miss. 461, 115 So. 557.

Watkins v. State Board, 170 Miss. 26, 154 So. 277.

Hayes, et al v. First Joint Stock Land Bank, 174 Miss. 880, 165 So. 605.

Russell v. Federal Land Bank, 180 Miss. 55, 176 So. 737.

Bass v. Borries, 116 Miss. 419, 77 So. 189.

Coleman v. Smith, 124 Miss. 604, 87 So. 7.

Brooklyn v. National City Bank, 102 U. S. 14, 26 L. Ed. 61.

34 Corpus Juris, Judgments, Section 1438, page 1014.

Kapiolani Estate v. Atcherley, 238 U. S. 119, 59 L. Ed. 1229.

Bigelow v. Old Dominion, etc. Co., 225 U. S. 111, 56 L. Ed. 1009.

Old Colony Trust Co. v. Omaha, 230 U. S. 100, 57 L. Ed. 1410.

Radford v. Myers, 231 U. S. 725, 58 L. Ed. 454.
Radio Corporation of America v. Radio Engineering Laboratories, 293 U. S. 1, 79 L. Ed. 163.
Wood v. Davis, 7 Cranch 271, 3 L. Ed. 339.
True-Hixon Lbr. Co. v. Thorne, 171 Miss. 783, 158 So. 909.
Russell v. Place, 94 U. S. 606, 24 L. Ed. 214.
Desollar v. Hanscome, 158 U. S. 216, 39 L. Ed. 956.
50 Corpus Juris Secundum, Judgments, Paragraph 765, page 293.
Chantangco v. Abaroa, 218 U. S. 476, 54 L. Ed. 1116.
Litchfield v. Goodnow, 123 U. S. 549, 31 L. Ed. 199.

CONCLUSION. (P. 105.)

Yick Wo v. Hopkins, 118 U. S. 356, 300 L. Ed. 220.
Myles Salt Co. v. Board of Commissioners, 239 U. S. 478, 60 L. Ed. 392.
State of Minnesota v. National Tea Co., 309 U. S. 551, 84 L. Ed. 920.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947.

No. .....

N. L. HUDSON, ET AL.,
Petitioners,

versus

GULF REFINING COMPANY, ET AL.,
Respondents.

BRIEF ON BEHALF OF PETITIONERS.

The pattern for this Petition is set by this Court's opinion in *Angel v. Bullington,* (February 17, 1947) L. Ed. Advance Opinions March 10, 1947, Page 557. Bullington was denied relief by the Supreme Court of North Carolina on what that court conceived to be "the adjective law of the State". He had asserted that such a holding would deny him his constitutional rights, and the Supreme Court of North Carolina chose not to deal directly with those rights.

Bullington thereupon abandoned his state court proceeding and sought the same relief in an action in the

Federal Court. This Court held that he was estopped to prosecute his Federal action by the judgment rendered in the state court case. Bullington's fatal mistake was that he failed to call on this Court to correct the error of the North Carolina Supreme Court in failing to give him his constitutional rights.

The predicament in which Petitioners are now cast parallels very closely that of Bullington. Here the Supreme Court of Mississippi has "put a Federal claim aside, as though it were not in litigation, by the talismanic word 'procedure' ", and has "concluded an adjudication of a Federal question even though it was not couched in those terms". The constitutional rights of Petitioners, stressed at every stage of their state court litigation, have been "defeated under the name of local practice"; the action of the Mississippi Court here offends just as directly as that of the North Carolina Court there against what this Court there said: "A state court cannot sterilize Federal claims by putting on the adjudication a local label." Petitioners, heeding the mandate of that case, are calling on this Court to give them relief "by the grace of certiorari" to escape the possibility that they, like Bullington, will have their Federal actions cut off by failure to invoke review by this Court.

A.

It is Duty of State Court to Enforce Rights Under the Federal Constitution.

The Court will understand that throughout these proceedings Petitioners have emphasized their reliance on

their Federal rights. Practically the only proof put in by them at the time of the hearing of their motion to dismiss was copies of the complaints filed by them in their Federal Court actions (R. 794, Appendix 62). At the crucial time when the trial court was attempting to force Petitioners to trial under armed guards Petitioners burned their bridges behind them and staked their main reliance on their claim that they were not being granted due process of law and the equal protection of the laws (R. 724, Appendix 64). Later in their assignment of errors (R. 1248, Appendix 79) they again emphasized this reliance. In spite of all that, neither the trial court nor the State Supreme Court once mentioned any Federal right. It was not lawful for the State Courts of Mississippi thus to ignore Constitutional rights:

> "That Constitution is the supreme law of the land, and 'upon the state courts, equally with the courts of the union, rests the obligation to guard and enforce every right secured by that Constitution'." *Smith v. O'Grady,* 312 U. S. 329, 85 L. Ed. 861.

To like effect is *United States v. Bank of New York & Trust Co.,* 296 U. S. 463, 80 L. Ed. 331, citing *Robb v. Connolly,* 111 U. S. 624, 28 L. Ed. 542, wherein attention is called to the fact that this Court gives effect to:

> "* * * such methods of procedure as shall serve to conciliate the distinct and independent tribunals of the states and of the union, so that they may co-operate as harmonious members of a judicial system co-extensive with the United States."

See also:

McKnett v. St. Louis, etc. Co., 292 U. S. 230, 78 L. Ed. 1227;
Postal, etc. v. Newport, 247 U. S. 464, 62 L. Ed. 1215;
Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791;
Crescent City, etc. Co. v. Butcher's Union, 130 U. S. 141, 30 L. Ed. 614.

B.

This Court Has Final Say Where Claim is Based on Denial of Constitutional Rights.

It is plain that the Court is not dealing here with a case where the decision of the Supreme Court of Mississippi could be sustained because it is placed upon adequate, independent non-Federal grounds. Every single procedural step taken was challenged as failing to afford due process of law and the equal protection of the law. The Constitutional question, therefore, lies at the threshold of the decision as it relates to every step in the proceeding. The non-Federal question cannot be reached without stepping over the Federal question which lies at the threshold.

It is plain, too, that this is not one of the cases where this Court feels called upon to approach the decision of a State Court "with deference"—cf. *Titus v. Wallick*, 306 U. S. 282, 83 L. Ed. 653. There is not the slightest dispute about what was done at every stage of the proceeding and how it was done. The Court, therefore, looks at the undisputed facts and sees if what was done squares with what the Constitution requires to be done.

The question of whether the Mississippi Courts granted Petitioners the protection of Mississippi procedural rules, and also whether those rules afford due process of law is, from the outset, a Federal question. Its laws of procedure are "fettered" at every step by the requirements of the Fourteenth Amendment—cf. *Angel v. Bullington, supra; Broderick v. Rosner,* 294 U. S. 629, 79 L. Ed. 1100.

Probably several dozen cases could be listed in which this Court has held that it reserves to itself the right to examine what a State Court has done in the name of its adjective law and determines for itself whether what was done offended against Constitutional guaranties. It will be sufficient to list a few:

Irving Trust Co. v. Day, 314 U. S. 556, 86 L. Ed. 452;
Minnesota v. National Tea Co., 309 U. S. 551, 84 L. Ed. 920;
Radio Station v. Johnson, 326 U. S. 120, 89 L. Ed. 2092;
Domorest v. City Bank, 321 U. S. 36, 88 L. Ed. 526;
Pennsylvania General Casualty Co. v. Pennsylvania, 294 U. S. 189, 79 L. Ed. 850;
Steele v. L. & N. R. R. Co., 323 U. S. 192, 89 L. Ed. 173;
Toucy v. New York, etc. Co., 314 U. S. 118, 86 L. Ed. 100;
Lovell v. City of Griffin, 58 S. Ct. 666, 82 L. Ed. 949;
Schuylkill, etc. Co. v. Commonwealth, 296 U. S. 113, 80 L. Ed. 91;
Milkwagon Drivers, etc. v. Meadowmoor Dairies, 312 U. S. 715, 85 L. Ed. 1145;

Chambers v. State, 309 U. S. 227, 84 L. Ed. 716;
United Gas, etc. Co. v. State of Texas, 303 U. S. 123, 82 L. Ed. 702;
Chicago, etc. Co. v. Rambo, 2989 U. S. 99, 80 L. Ed. 1066.

C.

ARGUMENT.

Petitioners claim that the actions taken by the trial court and by the Supreme Court of Mississippi in affirming the final decree of the lower court accomplished the taking of their property without due process of law, and the denial to them of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. It is contended that each succeeding step in the litigation standing alone denied these constitutional rights; and that the succession of acts, considered as a whole, results in the denial of Petitioners' constitutional rights without possibility of doubt.

The various steps in the State Court litigation will be considered in the order taken, it being understood that in each instance Petitioners contend that each step, standing alone and in conjunction with the other steps, violates their said constitutional rights.

I.

In Overruling Petitioners' Motion to Dismiss Without Prejudice.

It cannot be doubted that Petitioners had the absolute right to dismiss their State Court case without preju-

dice under the law of Mississippi. Following the decision of this Court in *Chicago, etc., Co. v. Union, etc., Co.*, 109 U. S. 702, 27 L. Ed. 1081, the Mississippi Court had, in the early decisions, been inclined to base the right to dismiss an equity case on principles of common law. See e. g. *State v. Hemmingway, et al*, (Miss. 1891) 69 Miss. 491, 10 So. 575; *Canadian, etc. Co. v. Fitzpatrick*, (1893) 71 Miss. 350, 14 So. 270; and *Russell v. Denson*, (1911) 98 Miss. 862, 54 So. 439. Finally in *Adams v. Lucedale, etc. Co.*, (1917) 113 Miss. 608, 74 So. 435, the Mississippi Court declared that the right of a complainant to dismiss his equity case was given by statute as well as by common law and that the right was absolute:

> "It would not be contended that a plaintiff in a lawsuit may not suffer a non-suit, and we are unable to see why the statutory right could be denied by a chancellor . . . the chancellor has no more power or discretion . . . than a circuit judge.
>
> "After a thorough examination of the authorities we are convinced that the rule supported by all of the authorities, or at least by the great weight of authority, is to the effect that chancery or equity courts are controlled by a rule similar to our statutory rule. The only limitation of the rule is applied to the cases wherein the defendant has secured some right by the filing of the bill which would be destroyed by the dismissal of the bill. Even then it is not a matter of discretion with the chancellor, it is a right of the defendant which controls. The discretion of the court may be exercised when the time has passed for the plaintiff or complainant to dismiss as a matter of right; before that time there is no discretion.

> "In this state the right to suffer a non-suit is fixed by the statute quoted above, and, in terms we think this statute is applicable to equity courts. In equity courts the right ceases after the cause has been submitted to the chancellor; in law courts, after the case has been submitted to the jury. Probably the statute was not needed in equity practice, the right to dismiss already existed, but to make sure, the legislature made it apply to all courts wherein it was already applicable . . ."

The statutory right to dismiss is embraced in Sections 1538 and 1539 of the Mississippi Code of 1942, which are set forth on Page 6 of the Appendix.

Judge Griffith, Presiding Justice of Division B of the Supreme Court of Mississippi, in his work on Mississippi, Chancery Practice, thus epitomizes the rule in Paragraph 534 of that work:

> "The right of a complainant to take without prejudice a voluntary dismissal, said to have been an original right in equity, is now placed beyond all question by our statutes; the privilege continues up to the time when the cause has been submitted to the chancellor for final decision upon the merits of the case . . ."

The fight in the State Court case raged around the question of whether the defendants in that case had acquired certain superior rights bringing the case within the exception to the rule permitting dismissal. No such question is here presented, as the Supreme Court of Mississippi has not indicated that it gave serious consideration to the contention that Petitioners had lost their

right to dismiss because of the supposed acquisition by Respondents of some superior right to the maintenance of the State Court action.

The fact is that the decision of the Mississippi Supreme Court proceeds on the assumption that Petitioners did have the absolute right to dismiss their case, and the recognition of that right to dismiss is implicit in everything the Mississippi Court said. If that Court had entertained the slightest doubt of Petitioners' right to dismiss, it would have been very simple to have based the decision on the absence of the right to dismiss. The circuitous course followed by the decision of the Supreme Court of Mississippi could have been avoided if that Court had not recognized the absolute right to dismiss. When the Supreme Court of Mississippi said, in its opinion, (Appendix, Page 82): "Had there been no cross-bills, it may have been that the complainants would have had the right to dismiss, as they sought to do, . . ." It is clear that the Supreme Court did recognize the absolute right of Petitioners to dismiss.

Any consideration of whether the Petitioners were denied due process of law, therefore, must proceed on the assumption that the trial court committed error in refusing to permit Petitioners to dismiss their State Court case. Whether after such dismissal the trial court should have retained the crosss-bills is a matter for further argument. The right to dismiss is one thing; the retention of the cross-bill is another thing. We repeat, therefore, that a consideration of this whole case must start with

the predicate that the right of Petitioners to dismiss was plain, and that the chancellor committed error when he denied them that right. It should be borne in mind also that the chancellor wrongfully denied Petitioners the right to dismiss when he had before him copies of the complaints Petitioners had filed in the United States District Court (R. 794 et seq. Appendix 62.)

From that point on the chancellor was running in competition with the Federal actions and that fact was kept constantly before him by Petitioners and the constitutional rights claimed by Petitioners must be judged in the light of the fact that the actions of the State Courts were taken with full knowledge that those actions would, and did, impinge upon the jurisdiction of the Federal Court.

In denying Petitioners the right to their day in court on the merits of their controversy by the series of steps which will be discussed, the State Courts started out with a clear error in the first step taken. That fact ought to be borne in mind also in judging the efforts of Petitioners to safeguard their constitutional rights. What the Supreme Court of Mississippi once said, in reversing a chancellor for refusing to permit a complainant the right to dismiss his case without prejudice, is pertinent—*Russell v. Denson;* (1911) 98 Miss. 862, 54 So. 439:

> "Keeping always in view the fact that the purpose of the organization of courts is to give every citizen an opportunity to fairly litigate his supposed grievances on the merits . . . We think the court below erred . . . in not allowing the bill to be dismissed

without prejudice . . . No suitor should ever be defeated of a trial on the merits of his cause, except in case of inexcusable neglect."

II.

In Denying Interlocutory Appeal to Settle Petitioners' Right to Dismiss and Calling a Special Term and Forcing Petitioners to Go to Trial in the Face of Threats and Armed Guards When Petitioners Were Insisting on Their Constitutional Rights and Their Right to Pursue Federal Actions Free From Threats and Intimidation.

Under Section 1148 of the Mississippi Code of 1942 it is provided:

> "An appeal may in sound discretion be granted by the chancellor in term time, or in vacation, from any interlocutory order or decree . . . or when having sustained or overruled . . . a motion he may think an appeal proper in order to settle all the controlling principles involved in the cause . . ."

Any judge of the Supreme Court is given power, by Section 1957 of the same Code, to grant such interlocutory appeal where the chancellor has refused.

Petitioners promptly applied for such an interlocutory appeal, and the chancellor promptly overruled their application (R. 722-3), and Petitioners thereuon applied to a judge of the Supreme Court and that application was also denied (R. 1326). The next regular term of court at Pauling, where the case was pending, would not convene until the second Monday in July (Appendix 1), and in

the five months elapsing between the application and the trial date the Supreme Court certainly would have passed on the appeal and settled whether Petitioners did have the right to dismiss without prejudice. It was extremely urgent that Petitioners be given this opportunity to test finally their right to dismiss because of the rule of Mississippi practice providing that a litigant waives his right to dismiss without prejudice if he goes to trial on the merits—see e. g. *Mitchell et al v. Film Transit Co., et al,* (1943) 194 Miss. 550, 13 So. (2d) 154, from which the fifth syllabus is quoted:

> "Where guardian proceeded with trial after his motion to non-suit chancery case was overruled as if no motion had been made, he could not thereafter complain of order overruling motion."

In passing on the action of the chancery court in forcing Petitioners to go to trial at the special term or waive, under the foregoing rule, the clear error done them by the court in refusing their motion to dismiss, this Court should bear in mind the threats against Petitioners, their witnesses and attorneys, of which the chancellor took official cognizance in his letter of March 26, 1946 (R. 730, Appendix 63). The situation as it appeared to the chancellor was manifestly so tense that he thought it necessary to get his twelve "men of character and courage" from the opposite side of the county from the county seat of the First District, Paulding; and that he desired that his disclosure be kept confidential so that the public might have no notice of his action.

It is hard to conceive how such a drastic step could be kept from the knowledge of people in a rural community like this. Paulding is a village of about one hundred persons, situated about twelve miles from a railroad and thirty-five miles from any town which would be rated above the village class. The statutes of Mississippi give it a maximum of twelve regular days of chancery court per year (Appendix 1-2). It is accessible only by unpaved roads which meander through the rugged countryside—a fact which would necessarily loom large in the consciousness of a litigant or witness to whom protection would be afforded only while they were in the courtroom. At all events, what the chancellor desired to be kept confidential would certainly become public knowledge as soon as these special deputies began to search "every person who comes into the courtroom".

This letter from the chancellor constitutes the sole evidence of what transpired with respect to the furnishing of these special deputies. It is important to consider this in event any attempt should be made to speculate as to what actually transpired at the special term. This much is certain: more than a month before the convening of the special term the chancellor stated: "I am directing the sheriff to appoint twelve deputies . . . to attend the special term of court . . .", and this was followed by the unequivocal statement that it was the chancellor's purpose "to see that they are protected while attending court". The invitation to Petitioners to attend court carried the assurance of the protection outlined in this letter. It is unthinkable that the assured protection would not be furnished.

Under the circumstances set forth in this letter it is clear that "no trial in the true sense" could be afforded Petitioners—see the language of Mr. Justice Holmes in *Moore v. Dempsey,* 261 U. S. 86, 71 L. Ed. 543. The Supreme Court of Mississippi has itself condemned a trial attempted under such circumstances—*Fisher v. State,* 145 Miss. 116, 110 So. 361:

> "What is a fair trial? . . . There must not only be a fair and impartial jury and a learned and upright judge to instruct the jury and pass upon the legal questions, but there ought to be an atmosphere of calm, in which the witnesses can deliver their testimony without fear and intimidation, and in which the attorneys can assert the defendant's rights freely and fully, and in which the truth may be received and given credence without fear of violence . . ."

This Court has consistently required also "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"—*Hebert v. Louisiana,* 272 U. S. 312, 71 L. Ed. 270; and has rejected any course of action which "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".—See *Snyder v. Massachusetts,* 291 U. S. 96, 78 L. Ed. 674; *Rogers v. Peck,* 199 U. S. 425, 50 L. Ed. 256; *Brown v. Mississippi,* 297 U. S. 278, 80 L. Ed. 682.

It is necessary also to consider the attempt of the state court to force Petitioners to trial at the special term in the light of what was happening in their Federal actions

which they, as non-residents, were prosecuting with desperate haste, in an effort to procure a trial in an atmosphere of calm—it being remembered that "diversity jurisdiction . . . was put into the Constitution so as to prevent discrimination against outsiders . . .". *Angel v. Bullington, supra.* The full picture of what Petitioners had accomplished and were doing in the Federal Court was brought before the chancellor (R. 724, et seq., Appendix 64, et seq.), and it appeared that Petitioners had beaten back all efforts to dismiss their actions and abate them and had taken their testimony and that the Federal Court was ready to proceed with trial in an atmosphere "free of threats or intimidation". The plea then made to the Chancellor by Petitioners was based entirely on their constitutional rights (R. 728, Appendix 69). The Federal Court had entered its order overruling Respondents' motions to dismiss just eleven days before the chancellor wrote his letter of March 26th (R. 734). It is clear that if the chancellor had permitted the state court litigation to go on to the regular time of trial on the second Monday of July, the Federal Court would have completed the trial of the actions on their merits. What the state court did, therefore, was done deliberately and with full knowledge of the effect such action would have on the Petitioners in their effort to obtain a trial in the Federal Court.

In the light of all this the trial court treated the objection of Petitioners as a renewal of their motion to dismiss without prejudice, and overruled this motion again (R. 749-B, Appendix 77), and proceeded to a so-called

"hearing on the merits" in the absence of Petitioners, who had declined to proceed further, choosing to stand on their constitutional rights rather than face the threats mentioned by the chancellor and go through a trial which could have been nothing but a farce, and waive the error, now virtually admitted, of the court below in denying them the right to dismiss.

This forcing of the State Court case to trial out of its regular order under these circumstances and in direct disregard of the Federal rights so earnestly presented by Petitioners constitutes a direct impingement upon the jurisdiction of the Federal Court which was proceeding with Petitioners' Federal actions. What this court said in *Harrison v. St. L. & S. F. Railroad Co.*, 232 U. S. 318, 58 L. Ed. 621, applies in principle here:

> "It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its Constitutional authority is a power wholly independent of state action, and which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it."

In a decision rendered about the same time this court had something more to say (*Missouri, etc. Co. v. Larabee*, 234 U. S. 459, 58 L. Ed. 1398) about the unconstitutionality of any state action "which burdened or impeded the right of free access to the courts of the United States". And this court has made it clear all along that such inhibitions apply

to attempted exercise of judicial power by a state as well as legislative and executive power—See *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Donald v. Philadelphia, etc. Co.*, 241 U. S. 329, 60 L. Ed. 1027; *Terrell v. Burke, etc. So.*, 257 U. S. 529, 66 L. Ed. 352; and *New York, etc. Co. v. Head*, 234 U. S. 149, 58 L. Ed. 1259.

The reluctance of the United States District Court to engage in a race with the Chancery Court of Jasper County was natural and reciprocity in that regard by the State Court was clearly its duty—*United States v. Bank of New York*, 296 U. S. 463, 80 L. Ed. 331.

The error of the Chancery Court of Jasper County, Mississippi, is understandable upon an examination of the urgings of Respondents' counsel appearing on pages 73 et seq. of the Appendix. The chancellor was fervently importuned to proceed with the case by the representation of counsel that the State Court had exclusive jurisdiction—see e. g. the statement of Mr. Green at page 73 of the Appendix: "We thought and still think that the exclusive jurisdiction to adjudicate this case is vested in this court". An examination of the succeeding pages of the Appendix will show that every single attorney representing the various Respondents stated his opinion that the State Court had exclusive jurisdiction. One attorney who had apparently conceded that the Federal Court had concurrent jurisdiction was at pains to correct that concession and join the others in maintaining that the State Court alone had jurisdiction (Cf. Buchanan, Appendix, pages 73-75).

Apparently the learned chancellor was induced by these representations of distinguished counsel to turn his back on the contrary rule so clearly announced by this court in its more recent decisions—*Commonwealth v. Williams*, 294 U. S. 176, 79 L. Ed. 841, *Markham v. Allen*, 326 U. S. 490, 90 L. Ed. 256.

III.

In Proceeding to Judgment Against Petitioners on Ex Parte Hearing at a Time When the Case Was Not Triable Because of the Absence of Necessary Parties.

It is undisputed that Claudies Newell and Paul Ellis Newell were parties defendant to the suit brought by Petitioners (e. g. R. 2, 14, etc.), and that they were claiming title to an interest in several forty-acre tracts involved in the suit. It is further undisputed that they were minors and that service of process never had been obtained on them. All of this is confirmed by the first pleading filed on behalf of the defendants (R. 119-120, Appendix 15-16), in which the court was advised that these two minors had not been served with summons, and that they were absent from the country in the military service. Under those circumstances the case was not triable at all. No entry of appearance had been made for those minors and none could be made because they were minors.

This suit was brought under Sections 1314 and 1323 of the Mississippi Code of 1942, and under those statutes all persons claiming an interest in the land, title to which is sought to be confirmed, must be made parties defen-

dant. *Paepcke Leicht Lbr. Co. v. Savage*, 137 Miss. 11, 101 So. 709; *Smith v. Denny*, 90 Miss. 434, 43 So. 479; *Lamar Life Ins. Co. v. Billups*, 175 Miss. 771, 169 So. 32; *Dorsey, et al v. Sullivan*, 24 So. (2d) 852. The last named case was decided a little more than a year ago, and settles this question beyond possibility of doubt. Therein the Supreme Court of Mississippi made two quotations from Griffith's Mississippi Chancery Practice, Sections 263 and 556, which settle this point:

> "* * * the court will not proceed to a final decree as to any defendant until the cause is triable as to all the defendants * * *
>
> "Where there are several defendants, the cause is not ready for trial as to one, until ready as to all of the defendants * * *"

In the face of these clear and unequivocal holdings of the Mississippi Supreme Court how is it possible to think for a moment that this default against Petitioners can be sustained when the case was not triable at the time? There is not any claim that this rule of law had been changed or modified in any way. When Petitioners declined to proceed in the case they knew that the court could take no valid action in it. Petitioners could not have insisted on a trial, and if the case had gone to trial under the authorities cited, any decree rendered would have been a nullity. Is it possible that the rule is held not to work reciprocally? Are these non-residents of Mississippi to be denied the protection of Mississippi procedural statutes and decisions admitted to be the law of the State at this moment? It is perfectly clear that this

entire proceeding was void because the case was not then triable—and this result is reached without considering the sworn averments of the motion for stay to the effect that the absent minors would be denied rights under the Soldiers' and Sailors' Relief Act.

IV.

In Proceeding to a "Trial on the Merits", Including Decree on Cross-Bill, When Mississippi Practice Permitted Only Dismissal With Prejudice After Petitioners Declined to Proceed Further.

Under Mississippi procedure, when Petitioners declined to proceed further at the special term of chancery court the only thing the chancellor could do was to dismiss their bill with prejudice:

> "In order to carry out his purpose the guardian should have declined to proceed with the trial and thereupon the defendant would have been entitled to a dismissal with prejudice, which would have been a final judgment appealable by the guardian."
>
> *Mitchell v. Film Transit Co., 194 Miss. 550, 13 So. (2d) 154.*

That is the latest pronouncement of the Supreme Court of Mississippi, and is in a case involving procedural questions exactly like this one—even to the point of involving a cross-bill by the Transit Company.

The Supreme Court of Mississippi had, in 1882, decided the case of *Baird v. Bardwell, et al,* 60 Miss. 164, in which there was *obiter dictum* possibly in conflict with *Mitchell*

v. Transit, supra. Based solely on that old case, Judge Griffith, in his work on Mississippi Chancery Practice, seems to accord to the defendant in a chancery case a course of action partially similar to that following by Respondents in this case (Griffith's Mississippi Chancery Practice, Paragraphs 538 and 562). If *Baird v. Bardwell* should be considered in conflict with *Mitchell v. Transit,* it is, of course, overruled by the later case. Certainly Petitioners, faced with the extreme situation outlined above and called upon to decide their course of action, had the perfect right to accept the rule above quoted from a case hardly four years old.

Instead of proceeding to the only final judgment sanctioned by this rule of Mississippi practice—dismissal with prejudice—the chancery court proceeded to admit on this *ex parte* hearing (R. 854-1242) three hundred eighty-eight pages of evidence. This evidence assumed to relate to affirmative defenses and to the so-called cross-bills of Gulf and the Ridgeway group. The trial court further proceeded at one fell swoop to have a hearing on the demurrer to the cross-bill and to overrule it; and, at the same sitting, to hear evidence on the presumed issues of the cross-bill although those issues had not been defined by any answer on the part of Petitioners.

This court is not called upon to pass judgment on the right of the Supreme Court of Mississippi to change rules of procdure whenever it decides to do so. What this court faces is the failure of the trial court and the Mississippi Supreme Court to accord to Petitioners rights

given under rules of practice which are admitted to exist. That is entirely another matter.

V.

In Awarding Judgment Against Petitioners on the Cross-Bill of the Ridgways.

The Supreme Court of Mississippi affirmed the judgment of the trial court solely on the basis of the cross-bills of "Gulf Refining Company and some twenty-five other defendants". The twenty-five other defendants referred to in the opinion are the Ridgway group, whose answer begins on Page 452 of the Record (Appendix 28). The Supreme Court of Mississippi manifestly considered this so-called cross-bill of these twenty-five parties quite important, reference being made to it at a number of places in the opinion:

> "The twenty-five other defendants who made their answers cross-bills, in addition to setting up their particular interest in the premises, adopted all the denials and averments of the answer of the Gulf Refining Company and likewise, and as stated, made their answers cross-bills. * * *
>
> "Had there been no cross-bills, it may have been that the complainants would have had the right to dismiss * * *
>
> "We are of the opinion, therefore, that the court was correct in not dismissing the cross-bills, and in proceeding to a final hearing on them * * *
>
> "Under the cross-bills every issue and question * * * were adjudicated * * *"

The fact, is that this so-called cross-bill was an utter nullity and could not form the basis of any action or judgment by the court. Besides being subject to most of the infirmities hereafter discussed with respect to Gulf's cross-bill, the Ridgeway cross-bill was entitled to no consideration at all because it was never served. Section 1296 of the Mississippi Code of 1942 (Appendix 4) is the Mississippi statute dealing with cross-bills, and their service:

> "A defendant in a chancery suit may make his answer a cross-bill against the complainant, or his co-defendant or defendants, or all of them * * * and may require the same to be answered; * * * and he shall have process thereon against the defendants to such cross-bill, and the like proceedings thereon as in other bills or cross-bills; but five days' notice, in writing, to the solicitor of the complainant in the original bill shall be sufficient to require the complainant to appear to such cross-bill, and to answer the same within said time * * *"

No process was issued or served in connection with the Ridgeway cross-bill, no notice in writing to solicitors for Petitioners was given, no answer or other pleading was filed to the cross-bill, and not the slightest notice was paid to it by Petitioners. In fact, the pleading itself bore the heading of "Answer" only, and did not call itself a cross-bill. If authority were needed for the proposition that this cross-bill could furnish the basis for no judgment against Petitioners, it would be found in the late case of *Majure v. Johnson, et al*, 192 Miss. 810, 7 So. (2d) 545.

The cases from this court are, of course, all one way on the proposition that a judgment may not be taken against a party without notice to him and without the opportunity to defend.

Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791;
Brinkerhoff, etc. Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107;
American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231;
Chase National Bank v. Norwalk, 291 U. S. 431, 78 L. Ed. 894.

This Court need go no further than this point, we submit, to determine that the decision in this case should be reviewed and reversed. A reading of the opinion of the Supreme Court of Mississippi will show constant reference to this Ridgeway cross-bill as the basis for its holding. That it could furnish no such basis in the absence of process or notice of any kind, is too elementary for argument.

VI.

In Proceeding to Judgment on Gulf's Cross-Bill Without Giving Petitioners the Opportunity to Answer and Defend it After the Demurrer to the Cross-Bill Was Overruled and When Petitioners Had Settled With Gulf.

The argument under this point does not deal with the question of the propriety of overruling the demurrer to the cross-bill or the question of whether the dismissal of the original bill would carry Gulf's cross-bill

with it. Those points will be presented *infra*. We deal here with Gulf's cross-bill on the assumption that the demurrer was properly overruled.

There is no question that Gulf's cross-bill was properly served under Mississippi statutes. As heretofore shown, Petitioners waived the service of Gulf's cross-bill, and asked and obtained time to answer and file their demurrer to the cross-bill. The point here made is that the action of the Mississippi State Court on the cross-bill after overruling the demurrer did not square with accepted Mississippi practice or with the constitutional requirements of due process of law.

A comprehensive scheme of chancery practice was enacted by the Legislature of Mississippi as Chapter 151 of the General Laws of 1924. The various provisions of that Chapter are now carried as sections in the Mississippi Code of 1942, and reference will be made to the Code sections though the scheme provided can best be understood by examining said Chapter 151. It is contended that under that scheme of chancery practice it was not permissible that a judgment be entered in favor of Gulf Refining Company and against Petitioners without giving Petitioners the opportunity to answer and defend the cross-bill.

1. Section 1296 of the Mississippi Code (Appendix 4) provides that cross-bills shall be dealt with as other bills. And Section 1289 of the Mississippi Code (Appendix 3)

deals with procedure to be followed upon the overruling of a demurrer. Therein it is provided:

> "It shall be the duty of the chancellor to act on said demurrer promptly and in his decree he will fix a reasonable time to amend or answer * * *"

Under the heading "Requirements Respecting Answer When Demurrer is Overruled", Judge Griffith, in Paragraph 310 of his book, refers to that Section and reiterates the rule as follows:

> "If the demurrer be overruled the court will require that in a reasonable time all the circumstances considered, the defendant shall file his answer * * *"

The Mississippi rule is in accord with the general rule as set forth in *19 American Jurisprudence, Equity*, Paragraph 318, Page 227:

> "According to the general rule, a decree should not be entered directly on the overruling of a demurrer to a bill, but the defendant should be ordered to answer the bill * * *. In default of such answer a pro confesso decree will be taken, and the cause will be proceeded with ex parte. The bill may not be taken or confessed until opportunity has been given to the defendant to answer, inasmuch as the rule is that upon an order overruling such a demurrer, the defendant is entitled to an opportunity to answer the bill. The permission to answer such bill must be given, notwithstanding the time which is prescribed by statute within which, unless for good cause shown, the defendant may and shall file an answer has expired."

The protection afforded by this salutary rule is strengthened by the Mississippi Statutes prescribing the duties of the clerk of court in setting down the cases for hearing at a term of court. Section 1240 of the Mississippi Code requires the clerk to keep an issue docket, and Section 1241 requires that the clerk enter, without request, on that issue docket causes which are at issue. But he cannot place on the issue docket any cause pending on demurrer. Section 1244 provides for the entry of those causes on an entirely different docket:

> "Motion Docket and Entries.—The clerk shall also keep a motion docket in which he shall, in the order in which they are filed, docket as of course and without request, all demurrers * * *"

The only way the cross-bill of Gulf could have gotten onto the issue docket for trial at all would have been under Section 1286 of the Mississippi Code, which provides for decrees *pro confesso* after the taking of which the clerk is required to set the cause down on the issue docket (Appendix 2).

None of the requirements of this statutory scheme were observed by Gulf or enforced by the court in acting on the cross-bill. The final decree (R. 749-A, et seq., Appendix 76, et seq.) shows that the court below proceeded to do at one continuous hearing the following things in the order named: Affirmed its ruling in refusing to allow Petitioners to dismiss without prejudice, dismissed the original bill and amendments with prejudice, overruled the demurrer of Petitioners to Gulf's cross-bill, and granted the prayer of the cross-bill as

against Petitioners. This proceeding does violence to the Statutes of Mississippi as well as to every conception of due process as set forth in the decisions cited in this brief. It may be that the trial court could have fixed a very short time in which Petitioners would have been required to answer after their demurrer was overruled; but the court could not brush aside entirely the requirement that some interval of time be given for answer.

The presumption is that Petitioners would have answered the cross-bill because they were litigating every single issue the cross-bill could possibly have raised. Gulf had ample protection under the Statutes of Mississippi, and could even attach the person of Petitioners instead of taking decree *pro confesso* against them—Sections 1297-8 Mississippi Code of 1942 (Appendix 4.)

If Petitioners had filed an answer one line long to the cross-bill the case would not have been triable at the term under Section 1310 of the Mississippi Code of 1942 (Appendix 5) reading in part as follows:

> "Cause Triable When.—After the expiration of thirty days from the due date of the answer or answers the cause shall be deemed as triable, and the clerk will thereupon, without request, set the same down on the proper docket for hearing * * *."

Traditionally, no proof could be taken on any matter not made an issue by the bill and answer, and the complainant had available to him a process of attachment against the person and distraint against the property of the defendant for the purpose of compelling an answer

upon which issues could be claimed. This practice is preserved in Mississippi under Section 1297, Mississippi Code of 1942 (Appendix 4). The development of the decree *pro confesso* to overcome the disadvantages of this system is outlined in the early opinions of the Supreme Court in *Thomas v. Worcester,* 114 U. S. 104, 29 L. Ed. 105, and cases cited; and in *Hovey v. Elliott,* 167 U. S. 409, 418, 42 L. Ed. 215.

Even if the procedure which the trial court followed had conformed to the requirements of Mississippi practice, the course of the decisions of this Court demonstrate its disposition to pass "judgment upon the whole course of proceeding to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples * * * " —*Malinsky v. People,* 321 U. S. 401, 89 L. Ed. 1029. Nor will this Court be deterred from a full and unfettered examination of the facts attending the procedural steps by which this judgment is affirmed because of any argument which may be made to the effect that the decision of a state court concerning a matter of state practice is entitled to weight. Cf. *Titus v. Wallick,* 306 U. S. 282, 83 L. Ed. 653. The case now before this Court stands on facts which are entirely undisputed and in such a case this Court reaches its own decision as to the legal effect of those facts uninfluenced by anything that the state court may have decided or failed to decide:

> "In all cases coming to us from a state court, we pay great deference to its determinations of fact. But when the existence of an asserted Federal right

cr immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the Federal right or immunity, as applied, we are free to re-examine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained."

Hooven, etc. Co. v. Evatt, 324 U. S. 652, 89 L. Ed. 1252.

Indeed it cannot possibly be conceived that the decision of this case could rest on adequate independent non-Federal grounds. Every step taken in the case is challenged on the ground that it did not afford due process of law or the equal protection of the laws. In such a case this court will review the decision of the State Court even though it seems to rest entirely on local law.

Schuylkill Co. v. Commonwealth of Pennsylvania, 296 U. S. 113, 80 L. Ed. 91;

Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. Ed. 1102;

Ancient, etc., Order v. Michaux, 279 U. S. 737, 73 L. Ed. 931;

Southern Pacific Co. v. State, ex rel, 325 U. S. 761, 89 L. Ed. 1915;

United States Gas, etc. Co. v. Texas, 303 U. S. 123, 82 L. Ed. 702;

Chicago, etc., Co. v. Rambo, 298 U. S. 99, 80 L. Ed. 1066;

Williams v. State of North Carolina, 325 U. S. 226, 89 L. Ed. 1577;

Adam v. Saenger, 303 U. S. 59, 82 L. Ed. 649;

International Harvester Co. v. Wisconsinn, 322 U. S. 435, 88 L. Ed. 1373.

2. *Gulf did not resist Petitioner's motion to dismiss.* When Petitioners filed their motion in the chancery court to dismiss without prejudice (R. 605, Appendix 30) the various parties filed written objections to such dismissal aggregating more than one hundred pages (R. 606-708), but Gulf did not file any objection to the non-suit. The point is made that Judge Griffith says in his book that no written response to a motion is necessary—though no case is cited for such a rule. But Gulf had already set its own standard of procedure in this case by filing an elaborate answer (R. 524-529) to a similiar motion which had been litigated between Gulf and Petitioners. It is incomprehensible that Gulf would file its written defense to that motion it objected to and then withhold the filing of a written objection to the granting of a motion far more important than the one so defended by it. The plain fact is that Gulf knew it had settled with Petitioners and did not demonstrate any interest in what happened in the lawsuit then pending.

As confirmatory of this attitude of non-belligerence on the part of Gulf, it will be noted that more than one hundred pages of evidence was introduced on the hearing of the motion to dismiss (R. 753-851); and although the attorneys for Gulf were present, they did not participate in the hearing on the motion or offer the slightest objection to its being granted.

Gulf did not get into the fight until after Petitioners had filed their written objection to a trial in response to the chancellor's letter and all of the rights of the parties had been pegged by that letter and the objection had

been presented, and Petitioners were in the act of leaving the courtroom. Thereupon one of the attorneys for Gulf arose and expressed the idea that the chancery court had exclusive jurisdiction (R. 856-7, Appendix 72-3) to adjudicate the case and adverted to the fact that Gulf had interposed a cross-bill. This Court has been at pains to express its condemnation of reliance on such informal notice—*Chase National Bank v. Norwalk*, 291 U. S. 431, 78 L. Ed. 894. Gulf will not be heard to press its cross-bill under such a course of conduct calculated so completed to lull Petitioners into the conviction that Gulf was not further pursuing the litigation.

3. *The cross-bill of Gulf did not present an accurate picture of the situation at that time.* A year and a half before the cross-bill was presented to the trial court Gulf had settled with Petitioners by negotiating and accepting a lease in which Petitioners had granted to Gulf everything Gulf was claiming from the other fee claimants (R. 755, et seq., Appendix 41 et seq.). If it be contended that Gulf had, in this lease, reserved the right to continue this litgation, Petitioners had, in the Federal Court, filed an action to reform that portion of the lease and Gulf knew that (R. 732 et seq.).

At all events and from any angle, this settlement between Petitioners and Gulf had an important bearing on the issues Gulf sought to raise against Petitioners in its cross-bill. Despite the lapse of a year and a half, Gulf had never amended its cross-bill to show this settlement, and it did not amend its cross-bill when it sought to make it the basis of a decree against Petitioners. In pro-

ceeding to judgment *ex parte* Gulf failed entirely to amend its cross-bill to conform to the situation then known to it, and the decree thus obtained on the cross-bill lacks the qualities which will make it square with due process of law.

These facts emphasize the wrong done Petitioners in failing to give them time in which to answer Gulf's cross-bill. It is certain that Petitioners would have brought the fact of this settlement before the court. The whole proceeding in connection with the cross-bill comes within the definite condemnation of the decision of this court in *American Surety Co. v. Baldwin*, 287 U. S. 156, 77 L. Ed. 231, wherein the court, through Mr. Justice Brandeis, said: "Due process requires that there be an opportunity to present every available defense."

VII.

In Awarding Judgment Against Petitioners and in Favor of Gulf Refining Company in a Case Not Justiciable Because it Had Become Moot.

Gulf, of course, claimed no interest in the land involved in this suit nor in any royalty. It claimed only an operating lease from the Lewises, the Newells, the Jones, the Windhams, the Betheas, fee claimants. Petitioners brought this suit against Gulf to cancel those leases. Gulf's cross-bill asked only that those leases be confirmed.

While that controversy was pending Petitioners and Gulf reached a settlement. By that settlement Petition-

ers conveyed to Gulf the identical leasehold interest under identical terms as those it claimed under the leases from Lewis, et al. Upon the acceptance of that conveyance Gulf therefore became the owner of everything which was in litigation between Gulf and Petitioners. Gulf of course endeavored to retain some fancied right to continue the pending litigation. The Court will not lose sight of the fact that Petitioners have an action pending in the Federal Court seeking to reform that portion of the lease (R. 732, et seq.). Aside from that, however, and regardless of however strong the desire might be on the part of Gulf to continue the fight, there was nothing left to fight about. Gulf had bought both sides of the lawsuit. In such circumstances it was the duty of the chancery court to refuse to hear Gulf's cross-bill because nothing of value was involved. This court has said that several times.

Gulf is in exactly the same position as complainants were in *American Wood Paper Co. v. Heft,* 8 Wall. 333, 19 L. Ed. 379. Complainants had brought suit to enjoin defendants from infringing the patent claimed by complainants. During the course of the litigation complainants bought the patents on which defendants were relying, but complainants attempted to carry on the litigation. This Court used this language in refusing to hear the case:

> "The case, as it now stands, is: the complainants having purchased in the patents under which the suit was defended, owns both sides of the subject matter of the litigation; * * * for this reason, the case should not be heard by this court."

The gist of that holding is thus expressed in the syllabus:

> "Where the complainants own both sides of the litigation and control them, the case should not be heard by this court. The litigation is no longer a real one."

The holding was similar in *South Spring, etc., Co. v. Amador, etc. Co.*, 145 U. S. 300, 36 L. Ed. 712. The suit was between two corporations and before it was submitted the control of both had come into the hands of the same persons, although there were still minority stockholders. Here is what this Court said in declining to entertain the litigation:

> "We cannot, however, consent to determine a controversy in which the plaintiff in error has become the *dominus litis* on both sides. * * * The litigation has ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one."

The following cases are to the same effect:

Dakota County v. Glidden, 113 U. S. 222, 28 L. Ed. 981;
California v. San Pahlo, etc. Co., 149 U. S. 308, 37 L. Ed. 747;
Mills v. Green, 159 U. S. 651, 40 L. Ed. 293.
Natural Milk Products Association v. San Francisco, 317 U. S. 423, 87 L. Ed. 375;
C. I. O. v. McAdory, 325 U. S. 472, 89 L. Ed. 1741.

VIII.

In Awarding Judgment Against Petitioners on Cross-Bills Which on Their Face Showed No Right to Relief and to Which a Demurrer Had Been Interposed; Especially After the Original Bill Has Been Dismissed.

The argument here will be confined to Gulf's cross-bill. The Ridgeway cross-bill is out of the case because it was not served and at most it merely adopted Gulf's cross-bill.

The point is made that Gulf's cross-bill, on its face, did not entitle Gulf to any relief because the matters there pleaded were purely defensive. The demurrer which was interposed challenged Gulf's cross-bill on that ground and the demurrer should have been sustained. When Petitioners declined to proceed further they had the right to assume that no judgment would be awarded against them on a cross-bill which did not state a cause of action and to which their demurrer was pending. To award a judgment against them under those circumstances, taken in connection with those above outlined, would be to take their property without due process of law.

The excerpts from the original bill set forth in our Appendix (Pages 8 to 14) will show that Petitioners ask against Gulf only the cancellation of the leases Gulf claimed, together with relief incident thereto. Gulf's answer (R. 271, et seq., Appendix 17, et seq.) admitted the taking of the leases and that it was claiming title under those leases.

The bill prayed one thing, and one thing only—the cancellation of Gulf's four operating leases (R. 67-8, Appendix 13-14). The bill offered to do full equity by repaying Gulf all of its expenses in connection with any oil operations, and asked an accounting to determine how much complainants owed Gulf (R. 65, et seq., Appendix 12). Every single averment of Gulf's answer was addressed to that one prayer for relief, and all of the defenses set up by Gulf were urged to combat that prayer of relief.

Gulf's prayer for relief in its cross-bill (R. 300, Appendix 24) was that those four leases be confirmed. The entire battle ground had to do with those four leases: Petitioners asked their cancellation, Gulf asked their confirmation. If on a trial the Court should refuse cancellation, the result would be confirmation.

Petitioners promptly acknowledge service of Gulf's cross-bill (R. 300, Appendix 24) and promptly filed their demurrer (R. 398-400, Appendix 25). The demurrer was very full and constituted, in fact, a good brief on the subject. The final decree overruled this demurrer (R. 798-A, Appendix 76) and granted to Gulf the only relief sought by it in the cross-bill, "That the leases * * * as listed in its original answer and cross-bill * * * are hereby adjudged and decreed to be good and valid". The law in Mississippi, as elsewhere, is that a cross-bill which does not ask any relief except such as would be given upon the denial of the prayer of the original bill is not a good cross-bill, and is demurrable. The rule in Missis-

sippi is thus epitomized by Griffith's Mississippi Chancery Practice, Paragraph 379:

> "* * * If a cross-bill presents no ground for affirmative relief and sets up a claim purely defensive, and which therefore could be fully asserted in the answer, it is not a cross-bill and is demurrable as such."

Judge Griffith cites three Mississippi cases as the basis for this text:

> *Buckingham v. Wesson, (1877) 54 Miss. 526;*
> *Vaughan v. Hudson, (1882) 59 Miss. 421;*
> *Carter v. Harvey, (1890) 7 So. 286.*

Everyone of those cases holds exactly the rule we are contending for. The first syllabus of the Buckingham case will illustrate this:

> "Cross-bill. Its office. Defensive Matter. A cross-bill which presents no ground for relief, but sets up a claim purely defensive fully asserted in the answer, is demurrable."

In a case arising in Mississippi and applying the law of the State the Circuit Court of Appeals for the Fifth Circuit reached the identical conclusion in a case on all-fours with the one at bar—*Hinds, et al v. Martin* (C. C. A. 5, 1923) 286 Fed. 623. Martin filed his suit in the state court against Hinds and others to quiet title to certain timber lands in Mississippi. Hinds and others removed the case to the Federal Court and filed their answers claiming record title and claiming, as here, title by adverse possession. Later by amendment defendants

prayed that they, "Be decreed to be the sole, legal, and equitable owners of the land described therein". The Circuit Court of Appeals rejected the contention that this prayer would be sufficient to constitute a cross-bill holding that this was not a prayer for affirmative relief:

> "We do not think that the proposed amendment to the answer would have made it the equivalent of a cross-bill. The only prayer is that the bill of complaint against them be dismissed, and that they, the said defendants, be decreed to be the sole, legal and equitable owners of the land described therein. This would have been the legal consequence of a decree dismissing the bill upon the merits, and such a decree thereafter could have been pleaded as establishing the title of defendants over the plaintiff in any subsequent litigation respecting said land, as fully as a decree expressly stating that defendants were the legal and equitable owners.
>
> "A cross-bill seeking no discovery and setting up no defense which might not as well have been taken by the answer will be dismissed, with costs."

That language fits the situation here perfectly. It forms the basis *inter alia* for the general rule as set forth in 30 Corpus Juris Secundum, Page 788:

> "A cross-bill will not be entertained where the party filing it can obtain full relief in the process of adjudicating the issues tendered by the original bill. So, where a defendant can obtain, under the original bill and his answer thereto, all the relief or objects which he seeks, or to which he is entitled, a cross-bill is unnecessary and will not be permitted, and if filed it will be dismissed * * *."

See also to the same effect:

Ayres v. Carver, 58 U. S. 591, 15 L. Ed. 179;
Providence, etc. Co. v. Goodyear, 76 U. S. 807, 19 L. Ed. 587;
Ayres v. Chicago, 101 U. S. 184, 25 L. Ed. 838;
Miller, et al v. Ricky, 218 U. S. 258, 54 L. Ed. 1032;
Moore v. New York, etc., Exchange, 270 U. S. 593, 70 L. Ed. 750.

The Supreme Court of Mississippi affirmed the judgment of the lower court on the basis of the assumption that the original bill and amendments had been dismissed and that the cross-bills survived the dismissal and were adequate bases for relief. The opinion of the court itself, we submit, shows that the action of the Supreme Court is entirely without legal justification. The opinion is based entirely on the portion of Judge Griffith's work on Chancery Practice quoted therein (Appendix 84) which, after conceding that ordinarily the dismissal of the original bill carries with it the cross-bill, holds that the cross-bill will be retained if it

> "* * * seeks affirmative relief separately and independently of the original bill * * * and its facts be complete enough within themselves and without the aid of the original bill to make the granting of relief thereon practicable and proper."

Judge Griffith cites seven cases as authority for this proposition, all, of course, decisions of the Supreme Court of Mississippi: *Ladner v. Ogden,* (1856) 31 Miss. 332; *Gilmore v. Felhour,* (1871) 45 Miss. 627; *Thomason v. Neely,* (1874) 50 Miss. 310; *Belcher v. Wilkerson,* (1877) 54 Miss.

677; *Jacks v. Bridwell,* (1876) 51 Miss. 881; *DeWeese v. DeWeese, (1877)* 55 Miss. 315; *Sigman v. Lundy,* (1889) 66 Miss. 522, 6 So. 245. A detailed analysis of those cases is not necessary but a sufficient look at them should be taken to test the circumstances under which the Supreme Court of Mississippi has applied the rule.

In *Ladner v. Ogden* the cross-bill involved asked far more than the cross-bill here. The Mississippi Court held, however, that it did not ask independent relief and that it must fall upon the dismissal of the original bill. Here is a part of the language used:

> "When a cross-bill is filed for relief, separate and independent of the original bill * * * the dismissal of the original bill would not necessarily dismiss the cross-bill * * * but when it has direct reference to the relief sought in the original bill, and is rendered necessary by reason of the original bill involving some collateral right, affected by the relief sought in the original bill, it is to be considered as in the nature of a defense to the original bill; and when the claim therein asserted has been abandoned by the dismissal of the bill, the cross-bill would fall with it."

In *Gilmer v. Felhour* and *Thomason v. Neely,* the Mississippi Court held that the cross-bills went out with the original bill and furnish no particular help here, and the same is true of *Jacks v. Bridwell.*

Belcher v. Wilkerson presented facts very much like those involved here. Belcher filed his original bill to confirm a tax title, and in due time Wilkerson, as executor for one Freeman, was admitted as a party and permitted

to file his answer. He made his answer a cross-bill setting up that the tax title of Belcher was invalid and asking for possession of the land and an account of rents and profits. A year later Belcher paid the costs and dismissed his bill. Thereupon Wilkerson, showing service on his cross-bill on Belcher, set the case for final hearing on his cross-bill and obtained a final decree just as Gulf has sought to do here. The Supreme Court of Mississippi held that Wilkerson was properly in court and that the cross-bill was properly filed, but held also that Belcher had a right to dismiss his suit without prejudice and that the dismissal carried with it the cross-bill. Here is some of the language used:

> "As the decree was not final, and the cause was to be heard anew on its merits, as to the applicant for a hearing anew, it was a pending suit, and subject to the right of complainant in the original bill to dismiss it, as he might have done if a decree had not been made. The dismissal of the original bill carried with it the cross-bill."

DeWeese v. DeWeese, supra, represents the first instance where the Supreme Court of Mississippi held a cross-bill after the dismissal of the original bill and illustrates clearly what is meant by relief which is separate and independent. DeWeese sued his wife for divorce alleging desertion, and she answered denying the desertion and asserting her willingness to come back to him at any time. She made her answer a cross-bill for separate maintenance but did not ask a divorce. What she asked, therefore, was not a defense against the divorce asked by her husband, but was separate and independent relief although growing out of the matter included in the original bill.

After the proof was all in showing definitely the falsity of the husband's charges of desertion, the husband dismissed his bill without prejudice, and the court promptly allowed the dismissal. Upon the insistence of the wife, however, the court retained the cross-bill and granted relief on it, holding that the object of the husband in dismissing his bill was to delay the wife in getting the support to which she was entitled, and further that if the cross-bill were not retained, "very great suffering and privation" would be imposed on the wife. In affirming the action of the chancellor in that case the Supreme Court of Mississippi spoke in part as follows:

> "The general equity rule is that the dismissal of the original bill carries with it the cross-bill; but * * * this result will not necessarily follow where the cross-bill is filed for relief separate and independent of the original bill, though touching the same property or growing out of the same subject matter involved in the original bill * * *.
>
> "While it may be often difficult to apply accurately the rule laid down by this court in Ladner v. Ogden, supra * * * we think the case at bar falls fairly within it. The relief prayed by the wift, to-wit, support as wife, was wholly independent of the divorce asked by the husband. Having driven her from home, he was bound to accord it to her, whether she sought a divorce from him or resisted one sought by him * * *.
>
> "For these reasons, when the proof taken had established the truth of her statements, and the falsity of his, the chancellor properly, we think, retained the cross-bill, after the complainant had dismissed the original bill, in order that he might afford her this

> independent relief to which, in any event she was entitled * * *."

There is a clear illustration of what the courts mean by relief which is independent and separate though growing out of the subject matter of the suit. The wife could have maintained a bill for separate maintenance based, not on the dissolution of the marriage, but the perpetuation of it. When she denied her husband's charge of desertion she had completed the defense she offered to his suit for divorce. The claim she set up for separate maintenance, based as it was on the perpetuation of the marriage relationship, was not defensive at all to her husband's suit. It was independent and separate. That question could be raised only by a cross-bill.

The case of *Sigman v. Lundy, supra,* illustrates the definite limitations which the courts of Mississippi throw around the retention of a cross-bill. It is interesting in that the cross-bill in that case was retained only as an original bill and the defendant who filed the cross-bill was required to serve a regular summons on the cross-defendant and to proceed with the case just as if the cross-bill were an original bill.

Sigman brought his suit to confirm title against the Lundys, who were minors, and others and defendants answered and made their answer a cross-bill asking that certain written instruments not mentioned in the original bill be cancelled. Sigman dismissed his original bill in vacation and at the ensuing term of court the chancellor "made an order approving the dismissal"; the chancellor

retained the cross-bill, but retained it only as an original bill and ordered process to be issued on it as on an original bill. The defendants to that cross-bill did not demur, but entered their appearance and tried the case on the merits. The Supreme Court approved that as proper procedure in Mississippi, using in part this language:

> "It will be noted that the suit was proceeded with upon the cross-bill, as an original bill, and the appellees, the parties defendant, who exhibited the cross-bill, are designated as complainants throughout the opinion * * *.
>
> "The chancellor did not err in retaining the cross-bill and permitting complainants therein to proceed with it as an original bill. In Belcher v. Wilkerson, 54 Miss. 677, there was no order of court retaining the cross-bill, while in the case now before us the order of the chancellor expressly retained the cross-bill as an original bill and directed process to be issued on it as such. The appellant entered her appearance and answered, thus waiving the process directed to be issued."

Sigman v. Lundy is the only case Petitioners had to guide them as to Mississippi procedure when they declined to proceed further and left the courtroom. Assuming that they had to shoulder the responsibility of taking the chance that the Supreme Court of Mississippi would change the rule of *Sigman v. Lundy*, they did not have to take the responsibility of assuming that the court would not grant them the protection of that rule if it remained unchanged—and there is, of course, no claim that this rule has been changed. If Petitioners had been

dealt with according to the pattern of *Sigman v. Lundy*, the trial court would have dealt with them as follows:

First, Petitioners' motion to dismiss without prejudice would have been sustained; second, the cross-bill of Gulf (assuming for the moment that it was sufficient by itself) would have been retained as an original bill and summons thereon would have been issued returnable to the next term of court and would have been served on Petitioners; finally, trial would have been held on the cross-bill of Gulf as an original bill. The failure of the Mississippi Courts to follow rules of practice concededly in force at the time under the circumstances here set forth constitutes a clear denial to Petitioners of due process of law.

The decision of the Supreme Court of Mississippi in this case uses the language: "Particularly in this State", but the Mississippi rule is not different from the universal rule as recognized by this Court. It is sufficient to cite two or three cases so holding:

Dows v. The City of Chicago, 11 Wall. 108, 20 L. Ed. 65;
Holgate v. Eaton, 116 U. S. 33, 29 L. Ed. 538;
California, etc. Co. v. United States, 192 U. S. 355, 48 L. Ed. 476.

The decision of the Mississippi Supreme Court (Appendix 82) approves further the language of Section 384 of *Griffith's Mississippi Chancery Practice* in which it is held that the cross-bill, to furnish the basis of relief must be

complete without aid of the original bill, the exact language being:

> "• • • if the cross-bill and its facts be complete enough within themselves, and without the aid of the original bill to make the granting of relief thereon practicable and proper."

The requirements of a cross-bill generally are set forth in Judge Griffith's book, Paragraph 380, in part as follows:

> "The material facts of the cause of cross-suit shall be averred in the cross-bill in ordinary and concise language, with the same particularity, and with the same care and regard to the same substantitive and procedural requirements as control in an original bill, and must be as complete; and it must contain a prayer for relief, the rules in that respect being the same as apply to an original bill."

The Mississippi case cited as authority for the last quoted text is *Eustice v. Holmes*, 52 Miss. 314, and the case amply sustains the text.

Under those authorities, therefore, the cross-bill of Gulf resolved itself into an original bill by Gulf against Petitioners to confirm the leases Gulf had obtained from the Lewises and others, and its sufficiency must be tested under the requirements of "substantive and procedural requirements" applying to original bills. One of these requirements is the Mississippi Statute making it mandatory on a person seeking to quiet his title to deraign title—*Section 1325 Mississippi Code of 1942*, which reads in part as follows:

> "In bills to confirm title to real estate, and to cancel or remove clouds therefrom, the complainant

> must set forth in plain and concise language the deraignment of his title; and a mere statement therein that complainant is the real owner of the land shall be insufficient * * *."

The Supreme Court of Mississippi has rendered a number of opinions applying that statute in all of its rigor and holding pleadings insufficient which do not deraign title:

> *Russell v. Hickory, 116 Miss. 46, 76 So. 825;*
> *Longmeyer v. Mars, 124 Miss. 77, 86 So. 753;*
> *Eastman v. Wyatt Lbr. Co., 102 Miss. 313, 59 So. 93;*
> *Lyon Co. v. Ratliff, 129 Mis. 342, 92 So. 229.*

The opinion of the Supreme Court of Mississippi in this case proceeds on the necessary assumption that the original bill with amendments is entirely out of the case and cannot be considered in testing the adequacy of the cross-bill any more than if it had been completely torn up or had never existed. When this is done it is perfectly plain that the cross- bill, including all of the averments of the answer, of which it is a part, is entirely inadequate. For illustration, the cross-bill does not contain the name of any one of the Petitioners and without the bill it is perfectly impossible to tell who it is that Gulf is suing, and a decree in Gulf's favor could not be rendered because the names of its adversaries nowhere appear.

It is equally plain that there is no deraignment of title, without which the demurrer to the cross-bill ought to have been sustained and without which any decree on the cross-bill would be impossible. The answer of Gulf in many instances (R. 280, et seq.) merely admitted the averments of certain numbered paragraphs of the original

bill. These were the paragraphs setting forth a chain of title through which Mrs. Hudson claimed to have acquired title. With the original bill gone it is impossible to tell what it is Gulf was attempting to admit. Gulf's claim of adverse possession is equally unintelligible from the answer standing alone and without the original bill.

It is clear that the opinion of the Supreme Court of Mississippi in this case does not intend to overrule any of the quoted authorities, and that the requirements of them are still the rule of practice in Mississippi. There being no dispute about what the averments of the bill are and the averments of Gulf's answer and cross-bill, it remains but for this Court to lay those pleadings against the established rule in Mississippi and to hold that the Mississippi Court did not grant to these non-resident Petitioners the protection of the established rules of procedure in Mississippi.

IX.

By the Decision of the Supreme Court of Mississippi on a Point Never Presented To or Passed On by the Lower Court and Which Petitioners Never Had a Chance to Defend.

The cross-bills of Gulf and the Ridgways turned out to be the sole basis for the decision of the Supreme Court of Mississippi. The decision is based, we submit, on the assumption of a state of facts which never existed and which Petitioners were never given the chance to defend. The original bill was never dismissed by the court below,

and the court below was never called upon to rule on the retention of the cross-bill after the dismissal of the original bill. Yet that is what the Supreme Court of Mississippi assumes to have been done in its decision.

Here is the pith of that decision (Appendix 84 and 87):

> "Had there been no cross-bills, it may have been that the complainants would have had the right to dismiss, as they sought to do, but leaving that question aside for the moment, we are of the opinion that they had no right to do so and at the same time secure the dismissals of the cross-bills * * *.
>
> "We are of the opinion, therefore, that the Court was correct in not dismissing the cross-bills, and in proceeding to a final hearing on them * * *.
>
> "This brings us back to the original bill—whether it should have been dismissed, retaining the cross-bills * * *."

It is plain, therefore, that the Supreme Court of Mississppi was dealing with a situation which never existed and was assuming conditions entirely contrary to the fact. In conceding Petitioners' right to dismiss and in holding that such a dismissal would not carry with it the cross-bills, the Supreme Court of Mississippi was reaching entirely into the realm of facy, and the conclusion "that the court was correct in not dismissing the cross-bills" is wrong because the premises on which it is based were non-existent.

When the chancellor invited Petitioners to the special term of court and assured them of protection from the

threats recognized in his letter he said, in effect, to Petitioners:

> "You are admonished to come into court and try your case based on your original bill with amendments and the answers of the one hundred six defendants and all other pleadings which may properly come before the court."

That is the situation Petitioners were called upon to face. That is the situation which existed when they presented their written objection to a hearing. That is the situation on which they must stand or fall.

That is not the situation which the Supreme Court of Mississippi assumes to adjudicate. Its decision is based on the assumption that the chancellor, when he issued his invitation, said to Petitioners somethink like this:

> "Your original bill, with amendments, has now been dismissed without prejudice but this does not carry with it the cross-bills of Gulf and the Ridgways. You are admonished to come into court and defend these cross-bills."

That situation would have been entirely different. The issues of these cross-bills were quite restricted, and Petitioners had settled with Gulf—and does anyone now have the hardihood to contend that the Ridways' cross-bill is entitled to consideration?

At all events, the record does not reflect the slightest hint that the threats, the basic impediment to a trial, had emanated from Gulf or the Ridgways. It is entirely pos-

sible that Petitioners would have been content to try these restricted issues with this small group of litigants if Petitioners had been given the right to do so. It is perfectly plain that they were not given the right to answer to any such situation, and that Petitioners, if the decision stands, are to be stripped of their very valuable property rights on the basis of a situation they were never called upon to face. Mr. Justice Holmes many years ago placed the condemnation of this court on such an effort—*Davis v. Wechsler,* 263 U. S. 22, 68 L. Ed. 143 (cf. *Angel v. Bullington, supra*).

> "Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * *
>
> "If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even up local ground * * *. This is familiar as to the substantive law, and for the same reason it is necessary to see that local practice shall not be allowed to put unreasonable obstacels in the way * * *."

The granting of writ of certiorari in that case to the state court of Missouri and its subsequent reversal by this Court point the way clearly to a similar course here. The cases cited by Mr. Justice Holmes in that opinion, and the subsequent citations of *Davis v. Wechsler,* furnish an unanswerable brief on the point now under consideration.

A few years before that Mr. Justice Holmes had laid down the principle that the Fourteenth Amendment protects a litigant against the decision by a state court on a question he has not been called upon to defend or as to any matter concerning which he has not had a chance to put in his evidence—*Saunders v. Shaw*, 244 U. S. 317, 61 L. Ed. 1163. In that case this Court had before it the propriety of the exclusion of certain testimony at the trial in the Supreme Court of Louisiana. This Court held that the failure of the Louisiana Courts to permit the intervening defendant to offer his evidence was a denial of due process of law, and that the litigant was not bound to contemplate a decision which was reached unexpectedly and before he had any opportunity to be heard. Here is what the Court said on the subject:

> "He now brings this writ of error and says that he has been deprived of due process of law, contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with this view * * *.
>
> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State

> granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation * * *."

It is well to note, also, the language of Mr. Justice Holmes in commenting on the apparent assumption by the Supreme Court of Louisiana that it would do no good to give the complaining litigant an opportunity to introduce his evidence because under a decision rendered by this Court the previous year (*Myles Salt Co. v. Iberia, etc., District*, 239 U. S. 478, 60 L. Ed. 392) the facts were so clear that the evidence, when introduced, could not possibly affect the result:

> "It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

The language used a short time before that by Mr. Justice Pitney is equally applicable, passing as he was upon the contention that a litigant who has informal

notice of a proceeding is bound by its results—*Coe v. Armour Fertilizer Works*, 237 U. S. 413, 59 L. Ed. 1027:

> "But, it is said, plaintiff in error is not within that class; he in fact learned of the execution before his property was sold or even his possession was disturbed, and he had an opportunity for a hearing in the present proceeding as to all questions upon which the liability depended. The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error, and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have lead to the same result because he had no adequate defense upon the merits * * *.
>
> "And the effect of the decision under review was to convert his petition, which simply raised an issue of law under the state constitution and the Fourteenth Amendment, into a tender of an issue of fact * * * and then to hold him concluded upon the latter issue for failure to introduce evidence bearing upon it. In doing this, the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this without his consent—and the record shows no consent—is contrary to fundamental principles of justice * * *."

And this Court recently granted certiorari to a Circuit Court of Appeals on the ground that the Circuit Court of Appeals "had decided the merits on facts not contained in the record and on a theory which had never been tried

by the litigants", but later found that there was no merit in the asserted grounds—*Helis v. Ward,* 308 U. S. 365, 84 L. Ed. 327. See also the following cases recognizing the same principle: *Brickerhoff Co. v. Hill,* 281 U. S. 673, 74 L. Ed. 1107; *Mooney v. Holohan, supra; Roller v. Holly,* 176 U. S. 520, 44 L. Ed. 520; *American Surety Co. v. Baldwin,* 287 U. S. 156, 77 L. Ed. 231; *Georgia Railway, etc., Co. v. City of Decatur,* 295 U. S. 165, 79 L. Ed. 1365, and the authorities cited in connection with the next succeeding point.

Under these decisions it is manifest, we submit, that the holding of the Supreme Court of Mississippi that the rights of Petitioners are to be foreclosed on the hypothesis that they ought to have litigated with Gulf and the Ridgways on their cross-bills after the original bill and all answers had been dismissed, is a clear denial of the rights of Petitioners under the Fourteenth Amendment. Their valuable property rights are thus cut off because of their alleged failure to do something they never had a chance to do. They were invited into court to face one situation and held in default for not facing another situation with which they were not presented.

Nor can it be contended that Petitioners did not seasonably raise this point. The first time the point was ever brought into the case was when the Supreme Court rendered its decision. Petitioners immediately made the point in their suggestion of error that this was a new question and one which had not been litigated between the parties, and cited the foregoing cases of this Court as authority

for their contention that such a course violated their Constitutional rights. (R. 1301, 1313 et seq.)

X.

By the Decision of the Supreme Court of Mississippi Affirming a Judgment Against Petitioners on the Cross-Bills of Gulf Refining Company and the Ridgways Holding Said Judgment to be Res Judicata as Between Petitioners and Defendants Not Parties to Said Cross-Bills and as to Issues Not Involved in Said Cross-Bills, and When This Point Was Not Involved in the Decision of the Lower Court or Argued Before Said Supreme Court.

Here again is the decision by the appellate court on a point not presented to or decided by the lower court or argued before the Supreme Court. We pass up the question of whether Gulf or the Ridgways made the contention before the Supreme Court. It is perfectly obvious that the remaining parties to the suit—nearly one hundred in number—could not, and did not, raise the point in the lower court or the Supreme Court. This entire notion originated in the mind of the Supreme Court of Mississippi and it is subject to all of the criticism contained in the argument of the point just preceding.

In addition to that, we submit that it is not true that the decision of the cross-bills of the Ridgways and Gulf on their merits would be *res judicata* of other issues involving other parties. When such a holding is attacked on the ground that it offends against the rights of a litigant claimed under the Fourteenth Amendment, this

Court decides for itself who is bound by a judgment under the doctrines of *res judicata:*

Hansberry v. Lee, 311 U. S. 32, 85 L. Ed. 22;
Riley, et al., v. New York Trust Co., 315 U. S. 343, 86 L. Ed. 885;
Postal, etc., Co. v. Newport, 247 U. S. 464, 62 L. Ed. 1215;
Chase National Bank v. Norwalk, 291 U. S. 431, 78 L. Ed. 894.

In *Hansberry v. Lee, supra,* this Court, speaking through Mr. Justice Stone, made it clear that it will examine the question of *res judicata* when a judgment is attached on constitutional grounds:

> "State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the constitution of the United States. But when the judgment of a state court * * * is challenged for want of due process it becomes the duty of this court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes * * *."

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in *personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."

That decision reversed on writ of certiorari a decision of the Supreme Court of Illinois in a case resembling this one in many features.

This Court also reversed a decision of the Court of Appeals of Kentucky in which a successor corporation had been held liable under a judgment rendered against its predecessor. *(Postal vs. Newport, supra.)* In that decision this Court stated that it would look into the Constitutional question raised and also would look to see if the decision had sufficient basis to support it. We quote several separated excerpts from the opinion:

> "But the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted Federal rights has any support in the record; for if not, it is our duty to review and correct the error * * *."

> "*Res judicata,* like other kinds of estoppel, ordinarily is a matter of state law, and as the decision of of the state court in this case in effect rests upon that ground, this of itself would be sufficient to sustain the judgment against reversal in this court, except for two queries that must first be answered: (a) Is the question of state law, in this case, independent of the Federal questions? and (b) Is the decision reached upon that point sufficiently well founded to furnish adequate support for the judgment."

This Court decided that both questions should be answered by it in a way at variance with the answer given by the State Courts, and its discussion of the matter of privity there is quite illuminating.

Petitioners here promptly challenged the decision of the Supreme Court of Mississippi predicating their challenge on the denial of their rights under the Fourteenth Amendment to the Constitution (R. 1301, 1313 et seq.). The overruling of the suggestion of error amounts to the rejection of this contention even though, as throughout the record, the Supreme Court declined to advert to the Constitutional question.

Reviewing, as it will, the facts of the record entirely undisputed, this Court will, we apprehend, find that the decision of the Supreme Court of Mississippi on this point is wholly lacking in any authority to support it. It will be recalled that the Ridgway group claimed nothing but a royalty interest, and a fractional royalty interest at that, under forty acres out of the three hundred sixty acres involved in the litigation (R. 40-5, 452-5). The litigation between Petitioners and Gulf involved only three hundred twenty acres out of the three hundred sixty acres involved in the entire suit and brought into question nothing but a leasehold interest, which is all Gulf claimed. The question of the ownership of the fee was the subject of litigation between Petitioners and the five families claiming the fee, and the question of the ownership of mineral interests was the subject of litigation between Petitioners and a large number of the other defendants. Neither the Lewises nor the other fee claimants, nor any of those claiming mineral interests, were parties to the cross-bills of the Ridgways and Gulf. Under the decision of the Mississippi Court, therefore, all of these other parties are estopped even though they were not in court and were not litigating, and even though the issues in-

volved between the parties to the cross-bill were very much narrower than the issues involved as between Petitioners and the other parties.

It is not strange, therefore, that the Supreme Court of Mississippi could not find any authority to cite in support of the decision on *res judicata*. The two cases cited demonstrate the paucity of holdings similar to the one now under consideration. The first of these (*Van Zandt v. Town of Braxton*, 149 Miss. 461, 115 So. 557) was a taxpayer's suit. It was there held that all taxpayers are precluded as to issues once settled in a suit by some taxpayers. This is under well known principles governing "class suits" about which this Court spoke decisively in *Hansberry v. Lee, supra*. The other case (*Watkins v. State Board*, 170 Miss. 26, 154 So. 277) involved exactly the same persons as had conducted a prior litigation. Watkins had first applied to the Mississippi Board of Pharmacy for license as an assistant pharmacist and that had been adjudicated by the board. Later he applied to the same board to be granted a full license. The question in each instance was the applicant's moral character, and the board had already adjudicated that.

Certainly neither of those cases authorizes the holding of the Supreme Court in this case on *res judictata*. The same is true of the four sections of Judge Griffith's book to which the court referred (Appendix 87). Not one of those sections referred to *res judicata* or to parties and privies. Not one of those authorities referred to land titles or to vendor and vendee, or lessor and lessee, or

grantor and grantee, or to any of the legal principles lying at the bottom of *res judicata* in this case.

On the other hand the Supreme Court of Mississippi could have cited some of its own decisions holding in principle directly contrary to the one in this case. Such a case is *Hayes, et al v. First Joint Stock Land Bank*, 174 Miss. 880, 165 So. 605, from which the second syllabus is copied:

> "To apply res judicata rule to persons because of their privity with parties to suit, it must appear that estate or interest sought to be affected was acquired from or through such actual parties after litigation, and if estate or interest was acquired from an actual party prior to the litigation, purchaser for value, unless also party, will not be bound by decree."

Another such case is *Russell v. Federal Land Bank*, 180 Miss. 55, 176 So. 737:

> "Where remaindermen in deeds were not made parties to partition proceedings, remainder was not affected by decree rendered in such proceedings."

And likewise contrary to the decision in this case is *Bass v. Borries*, 116 Miss. 419, 77 So. 189, holding: "In a suit by assignee to foreclose trust deed securing note where the maker sought cancellation of note, interest of original payee, who was not a party, could not be affected"; and also *Coleman v. Smith*, 124 Miss. 604, 87 So. 7.

The court will recall that Gulf was claiming its title as against Petitioners on grounds other than, and not available to, the fee claimants or the other litigants. For

instance, Gulf claimed that it was an innocent purchaser for value without notice, and that Petitioners had estopped themselves to ask cancellation of Gulf's leases by standing silent and watching Gulf proceed with the drilling of wells under the leases Gulf claimed from the other fee claimants.

Under these circumstances and under the record of this case it does not appear but that the judgment on Gulf's cross-bill was predicated on one or more of those independent grounds. Under well settled principles of law, the decision of the Supreme Court of Mississippi seeking to extend the estoppel of the judgment to the fee claimants and the claimants of mineral interests cannot stand.

True-Hixon Lbr. Co. v. Thorne, 171 Miss. 783, 158 So. 909.
Russell v. Place, 94 U. S. 606, 24 L. Ed. 214.
Desollar v. Hanscome, 158 U. S. 216, 39 L. Ed. 956.

The court will recall also that the litigation between the Petitioners and Gulf involved only a limited leasehold interest. Gulf claimed that leasehold interest from the Lewises and the others who claimed the fee. Even assuming that the judgment on Gulf's cross-bill adjudicated that the record title of Gulf or its title by adverse possession was good, could it be said that this adjudication of the question of title was binding on the Lewises and the other fee claimants who were not parties to the litigation between Petitioners and Gulf?

Mutuality is, of course, the essence of *res judicata*. The rule is thus expressed in *50 Corpus Juris Secundum, Judgments*, paragraph 765, page 293:

> ". . . it is a rule that estoppel must be mutual; and therefore, a party will not be concluded, against his contention, by a former judgment, unless he could have used it as a protection, or as the foundation of a claim, had the judgment been the other way; and conversely no person may claim the benefit of a judgment as an estoppel on his adversary unless he would have been prejudiced by a contrary decision of the case."

This Court said the same thing in *Bigelow v. Old Dominion, etc. Co.*, 225 U. S. 111, 56 L. Ed. 1099: "It is a principle of general elementary law that the estoppel of a judgment must be mutual." See also:

> *Chantangco v. Abaroa, 218 U. S. 476, 54 L. Ed. 1116; Litchfield v. Goodnow, 123 U. S. 549, 31 L. Ed. 199; Brooklyn City, etc. Co. v. National Bank, 102 U. S. 14, 26 L. Ed. 61.*

The best way to test the question, therefore, is to turn the situation around and see whether or not a contrary judgment would be binding as between Petitioners and the fee claimants and others.

Suppose the Supreme Court of Mississippi, in the fight between Petitioners and Gulf, had decided that Gulf did not have good title and had avoided the leases given by the Lewises, et al. Would the Lewises be bound by that decree? If later the Lewises sued Petitioners to quiet title to the fee in their land, could Petitioners plead the

decree rendered between them and Gulf as *res judicata* of the Lewis suit? Certainly not. The rule which forbids any such unnatural result is thus stated in *34 Corpus Juris, Judgments,* discussing the relationship of vendor and purchaser (Section 1438, Page 1014):

> "A judgment in an action respecting real property or titles or rights thereto, against a grantor of such property, is binding on his grantee, provided the latter acquired his interest after the institution of the suit, or after the judgment was rendered, in the absence of a statutory provision to the contrary, but not where the rights of the grantee vested before the commencement of the action unless he is made a party thereto. The converse of the rule, however, does not apply as to the grantor with regard to judgments in actions by or against the grantee, A judgment against the grantee of land is not conclusive on his grantor, unless the latter was notified to come in and defend the action and had an opportunity to do so."

Under this authority Gulf, as vendee of title from Lewis, et al, could not possibly preclude Lewis, et al, by any judgment Gulf might have entered whether the judgment was favorable or unfavorable. If the Lewises, et al, are not estopped by the judgment in this case, of course, Petitioners are not estopped.

This Court was dealing with a situation like this in *Kapiolani Estate v. Atcherley,* 238 U. S. 119, 59 L. Ed. 1229, and its decision is cited in support of the text last above

quoted. The third syllabus of that decision sets forth the principle which is controlling here:

> "Notice of the suit and opportunity to defend it must be given to the warrantor of a title, or a judgment against the title in a suit against his grantee will not be available against him, if available at all, in favor of the successful assailant of the title."

The decision in *Chase National Bank v. Norwalk*, 291 U. S. 431, 78 L. Ed. 894, applies in principle here, involving, as it does, the question of whether a mortgagee is precluded by a state court judgment against his mortgagor. This court held the controlling question to be whether the mortgagee acquired his interest before the commencement of this suit. There is, of course, no question that whatever title Gulf had here it acquired prior to the beginning of the suit. The language this Court used in that case is persuasive here:

> "It is true that, in the absence of special circumstances, federal courts consider themselves bound by the construction theretofore given by the highest court of a State to its statutes. But, under well settled principles of jurisdiction, governing all courts, a decree against a mortgagor with respect to property does not bind a mortgagee whose interest was acquired before the commencement of the suit, unless he was a party to the proceeding. *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 122, 57 L. ed. 1410. For in every case where a mortgage was given before the litigation against the mortgagor was instituted, the mortgagee is entitled to have a decision determining his rights rendered on the basis of the facts and considerations adduced by him. * * *"

On a proposition as plain as this it would seem a work of supererrogation to attempt analysis of other cases. Along the same line as the foregoing are *Bigelow v. Old Dominion, etc. Co.*, 225 U. S. 111, 56 L. Ed. 1009; *Postal Telegraph v. Newport*, 247 U. S. 464, 62 L. Ed. 1215; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 57 L. Ed. 1410; *Radford v. Myers*, 231 U. S. 725, 58 L. Ed. 454; *Radio Corporation of America v. Radio Engineering Laboratories*, 293 U. S. 1, 79 L. Ed. 163; *Wood v. Davis*, 7 Cranch 271, 3 L. Ed. 339.

CONCLUSION.

By the decision and judgment in this case these Petitioners stand with the doors of the Mississippi Courts closed to them without having had the opportunity to produce their witnesses and develop their case on the merits. This has been done in the name of the adjective or procedural law of the State. Under the decisions of this Court that adjective law will be examined as it is actually applied to ascertain whether, under the circumstances existing, the steps taken have denied to Petitioners due process of law and the equal protection of the laws. It matters not whether the rule itself transgresses the Constitution or the failure to apply the rule or the manner of its application is "by public authority with an evil eye and an unequal hand" (cf. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Myles Salt Co. v. Board of Commissioners*, 239 U. S. 478, 60 L. Ed. 392), the result is the same. In every case this Court has had before it, it has stated that Constitutional rights may not be denied in the name of local practice.

The merits of the case are not involved. The points made by us relate to procedure alone—to the machinery by which the merits are reached. It would not be proper to advert at all to the supposed likelihood *vel non* that Petitioners will prevail. The question relates alone to whether they are going to be given their day in court.

This Petition and Brief present, we submit, a very clear case where the substantial rights of Petitioners under the Constitution of the United States, raised by them at every step of the proceeding, have been denied under the guise of State procedure, and have been denied without so much as being noticed by the State Court. Under the circumstances we submit that this Court should grant certiorari, and should make the disposition of the case which justice requires (*State of Minnesota v. National Tea Co.*, 309 U. S. 551, 84 L. Ed. 920); and that the Court should reverse the decision of the Supreme Court of Mississippi with directions to enter an order giving Petitioners the right to dismiss their State Court case without prejudice in order that they may be no longer fettered in the prosecution of their Federal actions.

Respectfully submitted,

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TABLE OF CONTENTS.

PAGE

Excerpts from Mississippi Code of 1942 1

Section 1215—

State divided into Districts, Terms of Court controlled by statute 1

Section 1217—

Jasper County, First Judicial District, Terms of Court 1

Section 1274—

Venue of suits of a local nature, process to issue to all counties 2

Section 1286—

When answer due, decree pro confesso in default of demurrer or answer 2

Section 1289—

Answer may include demurrer, Demurrer to be heard promptly, If demurrer overruled, time allowed for answer 3

Section 1296—

Answer may be made cross-bill, service of cross-bill answer and like proceeding as on original bill 4

Section 1297—

Proceedings to compel answer, decree pro confesso or attachment 4

Section 1302—

Amendments liberally allowed 5

Section 1310—

When cause triable, Thirty days allowed after date answer due, unless decree pro confesso entered; Case to be set on proper docket for hearing 5

Section 1412—

Provisions applicable to all courts 5

Section 1538--

Non-suit or dismissal—before jury retire .. 6

TABLE OF CONTENTS—(Continued)

Excerpts from Mississippi Code of 1942—(Cont'd):

PAGE

Section 1539—
Non-suit or dismissal before clerk in vacation, plaintiff to stand as though he had not instituted suit 6
Section 1646—
Special terms 6

Excerpts from Bill of Complaint 8
Motion to Stay Proceedings under Soldiers and Sailors Relief Act 15
Excerpt from Joint Answer of Minor Defendants Claiming Right to Stay under Soldiers and Sailors Relief Act 16
Excerpts from Answer of Gulf Refining Company 17
Cross-Bill of Gulf Refining Company 24
Demurrer to Cross-Bill of Gulf Refining Company 25
Excerpts from Answer of Ridgway Group 28
Motion of Complainants to Dismiss without Prejudice 30
Answer of Lewises to Motion to Dismiss without Prejudice 30
Supplemental Answer of Lewises to Motion to Dismiss 38
Protective Lease from Petitioners to Gulf Refining Company 42
Testimony in Opposition to Motion to Dismiss 55
Rebuttal Testimony on Motion to Dismiss Complaints filed in Federal Court Introduced in Evidence 62
Decree Overruling Motion to Dismiss 63
Letter from Chancellor Advising of Call of Special Term and Advising of Provision for Armed Guards 63

TABLE OF CONTENTS—(Continued)

	PAGE
Protest and Objection of Complainants Claiming Constitutional Rights	64
Transcript of Hearing on Protest and Objections	72
Complainants Withdraw	75
Final Decree	76
Assignment of Errors	79
Opinion of Supreme Court of Mississippi	82

IN THE
SUPREME COURT OF THE UNITED STATES

No. .....

N. L. HUDSON, ET AL.,
Petitioners,

versus

GULF REFINING COMPANY, ET AL.,
Respondents.

APPENDIX TO PETITION FOR CERTIORARI.

EXCERPTS FROM MISSISSIPPI CODE OF 1942.

#1215. Chancery Court district—terms.—The state is divided into eleven chancery court districts, severally numbered and composed of the counties as hereinafter shown. A court to be styled "the chancery court of the county of . . ." shall be held in each county, twice in each year, and as much oftener as is provided by law and shall commence at the time and, if business require, shall continue for the days specified, to-wit:

* * * * * * *

#1217. Second district.

The chancery court terms in the second district shall be as follows:

* * * * * *

Jasper county, first district, second Monday of January, six days, second Monday of July, six days.

* * * * * *

#1274. *Venue of suits.*—Suits to confirm title to real estate, and suits to cancel clouds or remove doubts therefrom, shall be brought in the county where the land, or some part thereof, is situated; suits against executors, administrators, and guardians, touching the performance of their official duties, and suits for an account and settlement by them, and suits for the distribution of personalty of decedents among the heirs and distributees, and suits for the payment of legacies, shall be brought in the chancery court in which the will was admitted to probate, or letters of administration were granted, or the guardian was appointed; other suits respecting real or personal property may be brought in the chancery court of the county in which the property, or some portion thereof, may be; and all cases not otherwise provided may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be found; and in all cases process may issue to any county to bring in defendants and to enforce all orders and decrees of the court.

#1286. *Defendant to answer or demur, when.*—When the process has been duly executed or publication completed, the defendant shall answer or demur on or before the second Monday of the month next succeeding that to which such process is returnable, or if the process be returnable to a regular term of the court the defendant shall

answer or demur on or before the first day of the term in default of which the bill or petition may be taken *pro confesso* at any rule day thereafter or in term time; and if the bill or petition be taken for confessed against all the defendants, the clerk shall set the cause down on the issue docket at once upon the granting or confirming of the decree *pro confesso* by the court.

#1289. *Legal sufficiency of bill or petition questioned by answer or demurrer—demurrer heard in vacation.*— When a bill or petition is deemed by the defendant to be demurrable he may embrace his defense or defenses thereto in point or points of law in his answer; or he may separately answer and demur; or he may within the time allowed for answer and in lieu thereof demur as heretofore. When a demurrer is filed whether separately, or when embraced in the answer, no part of the answer other than the demurrer shall be considered by the court on the hearing on the demurrer, and no averment in the answer shall be taken as waiving the demurrer or any of the grounds thereof. And when a demurrer is interposed during vacation any party to the suit, including the demurrant, may in the following manner obtain a vacation hearing on said demurrer, viz: He shall give to the opposite party not less than five days' written notice, accompanied with (1) a list of authorities on which he relies, or (2) his brief, if he wishes to elaborate his contentions in a brief, and at the same time he shall file among the papers in the case a copy of said notice and list or brief, within which five days the opposite party may likewise file his list of authorities or brief; and upon the expiration of said time the clerk shall send the entire

file to the chancellor. If either party shall desire to argue the matter orally before the chancellor, he will promptly and within the five days, notify the chancellor, and the opposite parties to that effect, and the chancellor shall fix therefor the earliest convenient and available day on or after the expiration of the five-day period first aforesaid. It shall be the duty of the chancellor to act on said demurrer promptly and in his decree he will fix a reasonable time to amend or answer as the case may be, provided: The chancellor may for just cause enlarge the time for filing responsive briefs, and he may permit or call for additional briefs.

#1296. *Answer may be made a cross bill.*—A defendant in a chancery suit may make his answer a cross-bill against the complainant, or his codefendant or defendants, or all of them; and may introduce any new matter therein material to his defense, and may require the same to be answered; and in the same manner may require of the complainant, or any of the defendants, a discovery of any matter material to his defense, and he shall have process thereon against the defendants to such cross-bill, and the like proceedings thereon as in other bills or cross-bills; but five days' notice, in writing, to the solicitor of the complainant in the original bill shall be sufficient to require the complainant to appear to such cross-bill, and to answer the same within said time, unless the court, or chancellor in vacation, for cause shown, extend the time for answering.

#1297. *Proceedings to compel an answer; defendant attached.*—When a defendant shall fail to answer within

the time required by law, the complainant, instead of taking a decree *pro confesso,* may obtain from the chancellor an order for an attachment, returnable in term-time, to compel such defendant to answer; but affidavit must be first made and filed in the cause, by the complainant, or his solicitor, that such answer is necessary for the ends of justice, as he believes.

#1302. *Amendments liberally allowed.*—Amendments shall be allowed in the pleadings and proceedings, on liberal terms, to prevent delay and injustice.

#1310. *Cause triable when.*—After the expiration of thirty days from the due date of the answer or answers the cause shall be deemed as triable, and the clerk will thereupon, without request set the same down on the proper docket for hearing; but the said thirty-day period of delay shall not apply in any of the following cases: (a) Bills and petitions taken *pro confesso;* (b) *ex parte* petitions; (c) proceedings in partition, where title is not controverted; (d) proceedings to foreclose liens; (e) in matters testamentary and of administration; (f) in minor's business; (g) in matters of persons of unsound mind and (h) in similar cases.

#1412. *Following provisions applicable to all courts.*—All things contained in this chapter, not restricted by their nature or by express provision to particular courts, shall be the rules of decision and proceeding in all courts whatsoever.

#1538. Nonsuit or dismissal—before jury retire from bar.—Every plaintiff desiring to suffer a nonsuit on trial shall be barred therefrom unless he do so before the jury retire to consider of its verdict.

#1539. Nonsuit—in vacation.—The plaintiff may suffer a nonsuit, or dismiss a cause, before the clerk in vacation, on paying all costs that have accrued; and the clerk shall enter on the declaration the disposition made of the same, with the date. Where the plaintiff has received satisfaction of the cause of action in vacation, he shall, by himself or his attorney, enter such satisfaction on the declaration, and sign the same; and where the plaintiff suffers a nonsuit; or dismisses his suit, without having received satisfaction, he shall stand in the same situation as though he had never instituted suit; but, if the defendant have pleaded or filed a set-off, he may elect to proceed on such counterclaim as a plaintiff, with all the rights of a plaintiff, as against the party who has suffered a non-suit or dismissed his cause, whether in term-time or vacation, and may have a new trial, and judgment if he maintain his demand.

#1646. Special terms.—When the business of a circuit or chancery court may require, the judge or chancellor, in term time or in vacation, may order a special term to be held, and the order shall be entered on the minutes or, if made in vacation, on the minutes of the special term. A special term shall not be held in a shorter time than twenty days from the date of the order; and the clerk of the court shall give two weeks' notice of the time of holding the same in some newspaper published in the

county, the proper costs of which notice shall be paid out of the county treasury; or, if there be no such paper, then by advertisement for the like time posted at the court-house door and at three other public places in the county, but a failure or irregularity in giving notice shall not affect the validity of any judgment or proceeding given or had at a special term.

(R. 1) BILL OF COMPLAINT (Excerpts).

Now come your complainants, * * * and in this their bill of complaint exhibited against said defendants herein, to-wit, The Gulf Refining Company, a corporation incorporated under the laws of the State of Delaware, and domiciled at Shreveport, Louisiana, and having offices and agents in the State (R. 2) of Mississippi upon whom personal service of process may be had; * * * (R. 5) would show unto the Court the following facts, to-wit:

That complainants herein are the owners in fee simple title, as tenants in common, to that certain property situated in the First Judicial District of Jasper County, Mississippi, and more particularly described as follows, to-wit:

The East Half of the Southeast Quarter of Section 19; the Southwest Quarter of the Southwest Quarter of Section 20; the East Half of the Northeast Quarter of Section 30; and the Northwest Quarter of Section 29, all in Township 1, North, Range 13, East; and complainants deraign their title to the above described land as follows, to-wit: * * *

(R. 13.) (15) Complainants further allege and aver that the records show that on October 26th, 1937, the said Jettie Kelly Windham, and her husband, George Windham, attempted to execute an oil, gas and mineral lease to the Gulf Refining Company, one of the defendants herein, covering the minerals under the following described lands: * * * which said instrument is recorded at Paulding,

(R. 14) Mississippi, in Oil & Gas Book No. 2, page 251, reference to which is hereby made for the purpose of identification and cancellation, as hereinafter set forth; * * *

(R. 33.) (42) Complainants would further show that the records show that on October 26th, 1937, the defendant, T. D. Lewis, and Annie Lewis, his wife, then and there attempted to execute an oil, (R. 34) gas and mineral lease to the defendant, the Gulf Refining Company, on the land described as * * * containing 122 acres, more or less, which said oil, gas and mineral lease was filed for record on November 5, 1938, and recorded in Book 2, page 219. The complainants further aver that on October 26th, 1937, the said T. D. Lewis and Annie Lewis, attempted to execute a correction mineral lease on the above land, which said instrument was filed for record February 19, 1944, and recorded in Book 9, pages 341-343, which said instruments are hereby referred to for the purpose of identification and cancellation, as hereinafter set forth. * * * that the Gulf Refining Company knew and had actual and constructive notice that the said T. D. Lewis and Annie Lewis were only tenants at the will and sufferance of the complainants; that they knew and had actual and constructive (R. 35) notice that the said T. D. Lewis had only acquired the unexpired life estate of the said Mrs. M. E. Hudson in and to the said land as hereinbefore set forth, and that upon the death of the said Mrs. M. E. Hudson the said T. D. Lewis and Annie Lewis became, were and are tenants at the will and sufferance of these complainants only, and that they had no sort of interest in said minerals under said land, and that the

said oil, gas and mineral lease conveyed no sort of interest in and to the minerals under said land. * * *

(R. 39.) (49) Complainants would further show that on September 17th, 1937, the said Maso Newell, one of the defendants herein, attempted to execute a certain oil, gas and mineral lease to the Gulf Refining Company, one of the defendants herein, covering the land last above described, which said oil, gas and mineral deed is recorded in the office of the Chancery Clerk at Paulding, Mississippi, in Book 6, page 547, which is hereby referred to for the purpose of identification and cancellation, as hereinafter set forth. * * * and that when the said Gulf Refining Company took said lease, they also knew and had actual and constructive notice and knowledge that the said Maso Newell was only a tenant at the will and sufferance of the complainants herein, and that all (R. 40) right, title and interest of the said Maso Newell had expired upon the death of the said Mrs. M. E. Hudson. * * *

(R. 43.) (55) Complainants would further show that the records (R. 44) disclose that on October 26, 1937, the said Margiree Jones and Ab Jones, defendants herein, attempted to execute a certain oil, gas and mineral lease on the land last above described to the defendant herein, the Gulf Refining Company, which said instrument was filed on November 4, 1937, and recorded in Book 2, page 213, which is hereby referred to for identification and cancellation as hereinafter set forth. * * *

(R. 45.) (56) Complainants would further show that the records disclose that on October 26th, 1937, the said

Margiree Jones, and her husband, Ab Jones, then and there attempted to convey to G. R. Ridgway all or a part of the minerals under said land described in the next preceding paragraphs, which said instrument was filed for record on November 1st, 1937, and which was recorded in Book 2, page 169, which is hereby referred to for the purpose of identification and cancellation, as hereinafter set forth. * * * and the said C. R. Ridgway knew and had actual and constructive notice and knowledge of all the facts hereinbefore set forth, and knew that the said grantors in said conveyance had no interest to convey, and that he acquired no interest thereby, but that said instrument operates to cast a cloud, doubt or suspicion upon the title of complainants. * * *

(R. 59.) Complainants charge on information and belief that the said J. S. Wheeles attempted to transfer and assign said lease on the said land above described to the Tidewater Associated Oil Company, but complainants are informed and charge on information and belief that the said Tidewater Associated Oil Company attempted to transfer and assign said oil, gas and mineral lease on said land to the Gulf (R. 60) Refining Company, but that none of said instruments have been found of record, and complainants charge on information and belief that the said J. S. Wheeles, Jr., and said Tidewater Associated Oil Company, or the said Gulf Refining Company claim or are asserting some sort of claim, right or title or interest under said lease recited to have been made in said deed. * * *

(R. 65.) (84) Complainants further aver that claiming under the said oil, gas and mineral lease executed by said T. D. Lewis, as hereinbefore set forth, and the other oil and gas leases heretofore mentioned, the said Gulf Refining Company, one of the defendants herein, then and there well knowing that it acquired no sort of right, title or interest under said oil, gas or mineral leases to (R. 66) the said land, then and there drilled a certain oil well on that part of the said land described as * * *, completed the said well as a producer, and the said Gulf Refining Company is claiming to own under its said oil, gas and mineral lease, seven-eighths interest in said minerals, but, as heretofore shown, the said Gulf Refining Company, has no sort of right, title or interest in and to any of the said minerals, and has no sort of right to occupy the said forty acres of land, or any part of the land hereinbefore described.

That complainants are advised and charge on information and belief, as the owners of the fee simple title in said land, that they are entitled, upon doing equity and paying to the said Gulf Refining Company the actual cost for the drilling of the said oil well, to be put into possession thereof, and that they are entitled, as they are advised and believe, to a temporary injunction enjoining and restraining the said Gulf Refining Company from paying out any part of the royalty under the said land to any of the defendants, as hereinbefore set out, or from converting to their own use any part of the seven-eighths of the said oil, gas and other minerals produced from said land. And complainants here and now offer to do full and complete equity and offer to pay when and as soon as

same can be ascertained, the actual cost of the drilling of the said oil well, or any other wells that may be drilled on the said lands herein described, so as to reimburse the said Gulf Refining Company for all costs and expenses in the drilling and equipping of the said oil wells.
* * *

(R. 67.) Wherefore, the premises considered, the complainants pray that all of said defendants herein be summoned as required by law to be and appear at the July 1944 Term of this Honorable Court to be held on the Second Monday in July, 1944, then and there to plead, answer or demur to the allegations of this bill of complaint, but not under oath, answer under oath being hereby expressly waived, and that upon a final hearing hereof this Court will adjudge and decree that the complainants are the owners in fee simple of the lands hereinabove described, and that this Court will cancel all of the instruments insofar as the same purport to or (R. 68) attempt to convey any part of the said lands or any interest therein. That this Court will hold that the defendants herein, having acquired their interest from life tenants or tenants at will and sufferance, became, were and are the tenants at the will and sufferance of the complainants, and that all of said instruments hereinbefore pointed out in said bill of complaint be cancelled insofar as the same affect the title of the complainants to the said lands hereinbefore described.

That this Court will order an accounting to determine the cost of drilling and equipping the said T. D. Lewis well, and also the cost of drilling and equipping the said Lewis-Morrison well, and that if complainants are entitled to recover their *pro rata* part of said Lewis-Morri-

son well, that the proportionate part of the cost thereof be also ascertained, and that the Court will order an accounting of the oil that has been produced or sold from the said wells, and that complainants have a decree for all of said oil or the value of all of said oil or other minerals that may have been produced or sold from the said Lewis well, and their *pro rata* part of all oil produced from the Lewis-Morrison well, and that after the cost of drilling and equipping the said wells has been ascertained, upon payment by complainants to the said Gulf Refining Company, or tender to them of the cost of drilling and equipping said wells, as hereinbefore set forth, that the said Lewis well be decreed to be the property of complainants, together with all oil produced therefrom, and that they be decreed to own their *pro rata* share in the Lewis-Morrison well and the oil produced therefrom.

Complainants further pray that this court shall issue from time to time, as the equities of the case may require, temporary injunctions and restraining orders or other process to protect the rights of all parties hereto pending the final determination of this cause, and that upon final hearing that this Court will grant writs of possession, where necessary, to put the complainants in (R. 69) possession of all or any part of the said lands.

And if complainants have not prayed for the proper relief, or have prayed for wrong, improper or insufficient relief, then they pray for such other, further, general and different relief as may be just and equitable in the premises.

And complainants will ever pray, etc.

* * * * * *

(R. 119) MOTION TO STAY PROCEEDINGS.

To the Honorable Chancery Court of said District and County:

Comes Mason Newell, Sr., guardian of the estates of Claudies Newell and Paul Ellis Newell, minors, and respectfully represents unto the court that his wards, Claudies Newell and Paul Ellis Newell, are now in the military service of the United States of America, and that said awards have not been legally served with process and that the said Claudies Newell and Paul Ellis Newell are entitled under the provisions of the Soldiers and Sailors Civil Relief Act of 1940 to a stay, postponement and suspension of the prosecution of this suit for the period of their military service and three months thereafter.

Petitioner further represents unto the court that the rights of the said Claudies Newell and Paul Ellis Newell will be prejudiced by the trial of this cause without their presence. Petitioner further represents unto the court that the complainants in the above styled cause have filed no affidavit stating that the said Claudies Newell and Paul Ellis Newell are not in the military service of the United States of America and further represents that the said complainants did not make diligent search and inquiry as to the present post office address, residence and street address of the said Claudies Newell and Paul Ellis Newell, which inquiry, if the same had been made, would have developed that the said Claudies Newell and Paul Ellis Newell are both in the military service of the United States.

Wherefore, premises considered, petitioner prays that (R. 120) the prosecution of the above styled cause be stayed, postponed and suspended during the period of the military service of the said Claudies Newell and Paul Ellis Newell and until they are legally served with process and have an opportunity to defend said suit. * * *

(R. 175) JOINT ANSWERS OF MASON NEWELL, SR., INDIVIDUALLY, AND MASON NEWELL, SR., GUARDIAN OF THE ESTATES OF CLAUDIES NEWELL, PAUL ELLIS NEWELL, ALFONZO NEWELL, JUANITA NEWELL AND MASON NEWELL, JR., MINORS (Excerpt).

* * * * * *

(R. 202.) Defendants would show unto the court that the wards of the defendant guardian, namely Claudies Newell and Paul Ellis Newell, are both in the military service of the United States of America, and that said wards have not been personally or legally served with process in this cause, and the said guardian hereby reserves unto his said wards all rights and privileges to which they are entitled to under the Soldiers and Sailors Relief Act, and would show unto the court that this answer is not intended to waive any rights on the part of the said two wards of said guardian, but all rights which they are entitled to assert in this cause on their (R. 203) behalf are prayed to be reserved unto said minors and to be retained by them, notwithstanding any allegations in the foregoing answer. * * *

(R. 271) ANSWER AND CROSS BILL OF GULF REFINING COMPANY (Excerpts).

Gulf Refining Company, a Delaware corporation, herein called "respondent" or "defendant", for answer unto said bill or such parts thereof as it is advised it is necessary for it to answer, answering says: * * *

(c) Herein "adverse possession", or equivalent phrase, means that the persons owning and through whom defendant claims were (R. 272) in actual possession of the land whereasto the averment is made, and that such possession was actual, continuous, exclusive, hostile, notorious, and open, under claim and color of title, as owners, and existed for a period in excess of ten years without interruption, and consisted in the enjoyment of the land as by an owner, and without limiting the foregoing generalization, consisting in cutting, selling, using timber and wood, farming, erection of houses and improvements, pasturing stock, assessing and paying taxes, leasing, both for agricultural purposes and for oil, gas and other minerals, and mortgaging the lands and doing each and every act that the lawful owner could do.

(d) Defendant had to it executed those mineral leases shown by EXHIBIT A, and made part hereof, which leases defendant acquired in good faith, paying value therefor, believing that its lessors were the sole, true, and lawful owners of the lands described in said leases, who were at the time of such leases in exclusive possession under deeds purporting to convey title in fee simple, such lessors at the time of such leases being in the sole and

exclusive possession of the entire tract of land described therein, and severed the mineral estate by the execution of the leases, whereafter this defendant took possession of the leasehold estate in said lands, pursuant to the terms of said leases, and was in the open, notorious, exclusive, adverse possession thereof against all persons other than its lessors, claiming said leasehold estate continuously under color of title and claim of right. Thereon this defendant paid the taxes, prospected, developed, and expended in drilling oil wells more than $150,000.00, and when it so thus acquired said leases, it was a purchaser for value in good faith and without notice, as herein defined.

(e) "Purchaser for value", or equivalent phrase especially when applied to the Gulf Refining Company, shall mean that it purchased and at the time of such purchase had no knowledge or notice (R. 273) actual or constructive of any claim or equity, adverse to or inconsistent with the fee simple title claimed and shown by the public records to be possessed by its lessors, respectively, and that without such notice or knowledge, it paid value for the legal title to that acquired under said leases, and since the date of acquisition has continuously paid taxes thereon as owner, and the delay rental contracted for, and exercised without interruption all ownership rights thereover. * * *

(R. 275.) Defendant purchased subsequent to three years from September 11, 1932, from responsible parties in possession, claiming the title in fee simple under absolute deeds to them executed and duly recorded, with

possession held for more than forty years. Defendant was assured by such persons so thus in possession of their ownership and their right of disposition, and to ther this defendant paid value for its leasehold estates, as shown by EXHIBIT A hereto annexed, promptly filed for record, and duly recorded. * * *

(R. 279.) (15) Defendant admits that Jettie Kelly Windham, and her husband, George Windham, executed an oil, gas, and mineral lease to this defendant, covering the land described in said bill, which instrument is recorded, as averred, and denies that said Jettie Kelly Windham and George Windham had no interest in said land, but were only tenants at will and sufferance of complainants. Defendant denies that said Jettie Kelly Windham and said George Windham so knew and denies that this defendant had actual and constructive notice thereof. On the contrary, this defendant purchased said lease and paid therefor in good faith, believing that said lessors owned the fee simple title, and being led thus to believe in said 1937 by all the information available from the public records of said County and by the claim and possession of its lessors whereon (R. 280) defendant relied and upon the faith of which it purchased and paid value. Said Windhams were in possession under absolute fee deeds running back for more than forty years. * * *

(R. 284.) (42) Defendant admits the execution of the oil, gas and mineral lease by T. D. Lewis, and Annie Lewis, his wife, to this defendant to the property described, and avers that it purchased said property in good faith and for value from the owner in possession claiming

title, duly evidenced by recorded deeds in fee simple. Defendant admits the execution of the correction deed, denies that at the time of the execution of said lease the said T. D. Lewis and Annie Lewis had no right, title, or interest in or to said land. Defendant denies that said T. D. Lewis and Annie Lewis knew or had actual and constructive notice, and the Gulf Refining Company had actual and constructive notice that the said T. D. Lewis and Annie Lewis were only tenants at the will and sufferance of the complainants, and denies that they were such in fact. * * *

(R. 286.) (49) Defendant admits that on September 17, 1943, (not 1937), by instrument recorded in Book 6, page 547, it acquired an oil, gas and mineral lease from Mason Newell, who was in possession claiming as the owner in fee under duly recorded instruments, and that therefor defendant in good faith paid value without notice or knowledge of any claims of complainants, and has continuously remained in possession through payment of delay rental and is presently the owner of those rights therein contained.

Defendant denies that at that date Mason Newell was a tenant at will or by sufferance, and denies that defendant knew or had notice that said Newell had only an estate at will or by sufferance, and denies that all of the rights of the said Newell had expired from the death of the said Hudson.

Defendant acquired in good faith all of its leases from lessors in possession under recorded instruments, showing

fee simple titles, claiming to own the property and to have the right of disposition. Said persons and their predecessors in title had been in adverse possession of that leased as hereinbefore defined, so that when defendant thus acquired from its said oil, gas, and minerals, it did so from those thus owning and in possession and that it was and is hereby a *bona fide* purchaser for value without notice. Defendant (R. 287) avers complainants, by reason of the lapse of more than twenty years, will be presumed to have executed a proper grant to those under whom this defendant claims.

As to the other allegations contained, defendant is without knowledge, information, or belief, and if its rights are to be in any way affected, demands strict proof. * * *

(R. 294.) (84) Defendant admits that it drilled a well on the T. D. Lewis land, but denies that it knew anything at all or had any notice at all of the alleged rights claimed by complainants.

Defendant admits that said well came in as a producer and admits that it claims to own the same in manner and form as set out in said EXHIBIT A, and denies that it has no right, title, or interest therein or thereto, but avers that it so has.

Defendant denies that complainants are the owners in fee simple and denies that they are offering to do full equity, for the amount expended in attempting to discover oil was very great, and having succeeded, the benefits of said discovery is not to be taken from defendant by complainants, who stood by and did nothing.

Defendant denies that complainants are entitled to a temporary injunction, defendant claiming in good faith and for value under a title reaching back for sixty-five years, and being amply solvent.

(R. 295.) Defendant denies that they are entitled to an injunction restraining the paying out of the royalty, as averred, or from converting to their own use any of the 7/8ths of the oil and gas produced from said land.

(85) Defendant admits the drilling and operating of the Lewis-Morrison well and admits the payment of the royalty, as averred, under lease, as averred, and admits that it is withdrawing said oil and has a right thus to do, and denies that complainants, or any of them, are entitled to any production from said one acre tract, or that they or any of them have any right, title, or interest in or to said land, or any part thereof.

Defendant denies that any survey is essential and denies that the complainants are entitled to any relief. * * *

(R. 299.) (h) Further answering, in the alternative, defendant represents that in the event the court should hold that the plaintiffs are the owners of the said lands, or any part thereof, against which defendant protests, then in that event and in the alternative defendant avers that such recovery of title and ownership by the complainants should not be allowed to the prejudice of the defendant but should be subject to and burdened with all the rights acquired by defendant under the aforesaid leases, all of which rights should be maintained and recog-

nized to be in full force and effect and binding upon complainants for the reasons, among others, (1) complainants wholly failed to modify, limit, question, or dispute the absolute disposition assumed to be made to the said Mary E. Hudson and by said Mary E. Hudson and by those claiming under and through her, although complainants had actual and constructive notice of such deeds and conveyances and had actual and constructive notice that Mary E. Hudson's vendees were exercising all acts of ownership over the land, under which deeds Mary E. Hudson and subsequent vendees were proclaimed to be the fee simple owners, and (2) complainants wholly failed and refused to have any of the deeds under which they herein claim to be re-recorded or re-established following their destruction by fire on September 10, 1932, as by the statutes of the State of Mississippi authorized and required, and by reason of such failure and refusal, as aforesaid, this defendant was led to and did acquire, subsequent to September 10, 1935, its said mineral leases in good faith, paying value therefor, from the parties in possession claiming to own the same in fee simple, as shown by the public records and deeds in their possession, without knowledge or notice, (R. 300) actual or constructive of any claim or equity, adverse to or inconsistent with the fee simple title claimed by its lessors, and complainants are now estopped to deny or question the validity and binding effect of said leases, which estoppel is hereby specifically pleaded as a bar to the demands and claims of complainants for the cancellation of said mineral leases.

V. Cross Bill.

And now having fully answered, this defendant makes its answer a cross bill and avers further, as follows, to-wit:

Cross complainant reavers by reference all facts precedently herein set forth, and that under said facts cross complainant avers that its leases shown in EXHIBIT A are good and valid and should be ratified and confirmed as against cross defendants, but should the Court not so decree, then, as against said cross defendants, cross complainant is entitled to an accounting whereby it will be vouchsafed a return of that by equity allowed, and therefor it hereby prays.

Cross complainant makes cross defendant all of the original complainants and prays that they be required to plead, answer, or demur, answer under oath being expressly waived, and that upon final hearing that said leases shown in EXHIBIT A be confirmed; if not, cross complainant be given that whereto under equity it is entitled, and for such other, further and general relief as in equity and good conscience it is entitled.

Respectfully,

GULF REFINING COMPANY * * *

On behalf of Cross Defendant named, copy of Cross Bill (R. 301) acknowledged on this date and further service waived.

(S.) L. F. EASTERLING,
Atty. for Cross-Defendants * * *

(R. 398) **DEMURRER.**

To the Chancery Court of the First Judicial District of Jasper County, Mississippi:

Now come the complainants herein, who are named as cross-defendants in the answer and cross-bill filed herein by the defendant and cross-complainant, Gulf Refining Company, by their attorneys, and demur to the said cross-bill, and for cause of demurrer thereto assign the following grounds, to-wit:

(1) The allegations of the cross-bill all go to a denial of the right of complainants to recover and are in effect but a defense to the bill of complaint and a denial of the right of complainants in the property sued for and to the right of complainants to recover said property and to the relief prayed for in the bill of complaint.

(2) The cross-bill presents no grounds for relief and is nothing more than an answer to the allegations of the bill of complaint.

(3) The cross-bill seeks no affirmative relief which could be granted as a matter of law under the allegations of the said cross-bill.

(4) All the relief prayed for in the cross-bill can (R. 399) properly and effectively be granted on the original bill of complaint and the answers thereto.

(5) All relief sought by the cross-bill is available to and can be had by the cross-complainant on the original bill

and the answers thereto in any final decree entered thereon.

(6) The cross-bill seeks to have ratified and confirmed by decree of this court, as against cross-defendants only, oil, gas and mineral leases executed to cross-complainant by other defendants herein, and not by cross-defendants, and the allegations of the cross-bill show that cross-defendants herein never executed and were not parties to or bound by said oil, gas and mineral leases or any of them; and, therefore, that cross-complainant is not entitled to have the same ratified and confirmed as against cross-defendants.

(7) The cross-bill seeks, in the alternative, as accounting whereby cross-complainant "will be vouchsafed a return of that equity allowed", without setting out the facts necessary to entitle cross-complainant to such relief.

(8) In the original bill, on pages 72 and 73, complainants and cross-defendants offer to do equity and to pay, when and as soon as the same can be ascertained, the actual costs and expenses of drilling and equipping any of said oil wells. On page 74 of said original bill it is prayed that an accounting be had to determine the costs and expenses of drilling and equipping said wells. The remedy of an accounting is sought in the original bill, and is thereby made available to cross-complainant herein, and therefore cross-complainant would be entitled to all and singular any and all relief sought by the cross-bill therefor.

(9) And for the other causes to be assigned at the hearing.

(S.) L. F. EASTERLING,
(S.) LESTER FRANKLIN,
Attorneys for Cross-Defendants.

(R. 400) CERTIFICATE.

We, the undersigned attorneys of records for cross-defendants, hereby certify that, in our opinion, the foregoing demurrer is well founded in point of law and should be sustained.

This the 25th day of September, 1944.

(S.) L. F. EASTERLING,
(S.) LESTER FRANKLIN,
Attorneys for Cross-Defendants.

(R. 452) ANSWER OF C. R. RIDGWAY, ET AL (Excerpts).

Now come Ridgway & McGehee, Inc., a Delaware Corporation, duly authorized to do business in Mississippi; Laurel Royalty Company, a Mississippi corporation; Magnolia State Royalties, Inc., a Mississippi corporation; Byrd-Frost, Inc., a corporation under the laws of the State of Colorado; L. E. Ridgway, Mrs. Leona M. Ridgway, W. E. McGehee, Mrs. Della Jones McGehee, Mrs. Hattie L. Ridgway, Mrs. Alice R. Blount, Mrs. Ruth R. Boswell, William Bryant Ridgway, W. S. Ridgway II, C. R. Ridgway, Jr., Sara R. Ridgway, all having a business domicile at Jackson, Mississippi; A. G. Dorchester, a resident citizen of Shreveport, Louisiana; H. C. McGehee, J. F. Moore and J. D. Griffing, resident citizens of Berryville, Virginia; E. B. McGehee, a resident citizen of Hinds County, Mississippi; C. Montfort McGehee, a resident citizen of Bristow, Oklahoma; B. M. Jones, a resident citizen of Holmes County, Mississippi; R. L. Jones, II, and E. E. Jones, resident citizens of Washington, D. C., and C. R. Ridgway, Jr., heretofore executor of the estate of C. R. Ridgway, deceased, herein called "Respondents", and for answer unto said bill or such parts thereof, as well as the amendment thereto, as they are advised is essential for them to answer, answering say:

1. To save prolixity by reference they and each of them adopt each and every affirmative averment and each and every denial contained in the answer of the Gulf Refining Company herein heretofore filed, as fully and completely, with all of the exhibits thereto, as though this answer contained said allegations and denials in (R.

453) full appropriately phrased to make them applicable to those herein thus appearing.

2. Respondents aver that Margiree Jones and her husband, Ab Jones, being the owner of and in possession of that certain land described in Section 56 of said original bill, asserting the right then and there to sell and convey the same, made, executed, and delivered to C. R. Ridgway a certain mineral deed in the form of EXHIBIT A hereto annexed and made part hereof, as fully as if copies herein, whereunder and whereby there was conveyed to said Ridgway and in him vested each and every right in said EXHIBIT A to set forth in manner and form as set forth, and that thereof said C. R. Ridgway became by purchase for value without notice the sole, true and lawful owner, * * *

(R. 455.) 6. Respondents likewise now adopt each and every separate affirmative defense by reference interposed by the Gulf Refining Company, which is applicable and appropriate to them, to save prolixity.

And now having fully answered, pray to be hence dismissed.

And now, Respondents readopt each allegation made herein and make this answer a cross bill against all complainants, reaverring all things contained in the answer of said Gulf Refining Company and contained herein and aver title to be in them vested in manner and form as shown.

Wherefore, Respondents pray that said title so thus vested, deraignment being as shown in the original bill, the answer, and herein, be confirmed and quieted.

Answer under oath is expressely waived.

Such further relief as the parties is entitled to is asked.

* * *

(R. 605) MOTION TO DISMISS WITHOUT PREJUDICE.

To Said Court:

Come the complainants, by their attorneys, and move the court to dismiss this suit without prejudice at the cost of the complainants, which costs are tendered herewith.

LAMAR F. EASTERLING,
LESTER C. FRANKLIN,
GEORGE E. SHAW,
CAMERON & WILLS,
(S.) By BEN F. CAMERON,
Solicitors for Complainants.

Filed Dec. 12, 1945. J. J. Denson, Clerk, Dorothy E. Lightsey, D. C. * * *

(R. 606) ANSWER OF THE DEFENDANTS TO THE MOTION OF THE COMPLAINANTS TO DISMISS THIS CAUSE WITHOUT PREJUDICE.

To the Chancery Court of said District, County and State:

And now come T. D. Lewis, Mrs. Annie Lewis, Rufus William Lewis, Thomas Melvin Lewis, Alvin Melton Lewis,

Helen Willema Lewis, adults, and Lucius Cook Lewis, Myrtis Lewis, Myrtle Lewis and Annie Catherine Lewis, Minors, by Thomas Melvin Lewis, their brother and legal Guardian, and the Tidewater Associated Oil Company, a corporation, and S. J. Hooper, H. A. Smith, and Mrs. Mamie Abney, some of the defendants in the above styled cause, and jointly and severally file this answer to the motion of the complainants to dismiss the original bill of complaint and all amendments thereto, without prejudice, and by way of objections to the dismissal of said bills without prejudice, and for grounds of objection, show the following, to-wit:

1. This cause was originally returnable to the January, 1945 term of this Honorable Court, and the complainants have sought and obtained several continuances of this cause. As shown by the original bill of complaint, they rely upon an alleged lost deed executed in or about the year 1878. On the face of the record, complainants are guilty of laches in filing this suit, and furthermore have been guilty of laches in their failure to prosecute the same diligently, and now they seek to dismiss without prejudice and (R. 607) reserve their rights to file another suit and thereby further delay a final determination of the issues presented by the pleadings in this cause. As a matter of fact, they have attempted already to file similar suits in the Federal District Court at Meridian, Mississippi, far removed from the county in which the lands are located, in which most of the witnesses reside, and the county in which the public records are available on the issue of title. No good cause is assigned for dismissal without prejudice, and the Court should not be called upon to assist

the complainants in preserving alleged rights based upon a stale case, or give countenance to their continued laches. The original bill of complaint sets forth the destruction of the court house and public records of the First Judicial District of Jasper County, Mississippi, in 1932, and if the complainants claim title under an alleged lost deed, which they aver was of record, and if said lost deed and the record thereof were destroyed, complainants had a remedy by Section 2346, Mississippi Code of 1930, to establish said lost deed and failed, neglected and refused to avail themselves of said quick or summary remedy, and in and by said failure are guilty of laches in asserting rights based on said alleged lost deed, and they filed no suit or made no claim to the lands involved in this proceeding until after a large oil field was developed and oil was produced from the lands herein involved.

2. The filing of the original bill in this cause has caused the Gulf Refining Company, which has a mineral lease on most of the lands claimed herein by T. D. Lewis and his family, and the Tidewater Associated Oil Company, which has a mineral lease on a portion of the lands owned by the Lewis family, to withhold the payment of royalties due under said mineral leases on the producing oil wells drilled in pursuance of said leases, and now drawing large quantities of oil from the lands involved in this suit. The adverse claim of the complainants in the filing of this suit has led the said Gulf Refining Company to negotiate for and obtain from the complainants (R. 608) herein, a so-called protective mineral lease, dated the 15th day of December, 1944, and of record in Deed Book No. 18, pages 479-485 of the Records of Deeds in the Office of the

Chancery Clerk of the First Judicial District of Jasper County, Mississippi, copy of which lease is hereto attached as a part hereof, marked Exhibit "A". The rights undertaken to be granted by the complainants to the lessee in said lease were bought for a substantial consideration. Paragraph 14 of said protective lease embraces a contract and understanding that the Gulf Refining Company does not admit that the complainants, the Hudsons, have any title to the oil, gas or minerals that may be produced, until by compromise settlement "or final decree in the suit entitled N. L. Hudson, et al, Complainants, vs. Gulf Refining Company, et al, Defendants, No. 398, First Judicial District of Jasper County, Mississippi", the complainants are given in that suit some title or interest in the lands or to the oil, gas and other minerals thereon and thereunder. By said paragraph, it is recited that the lessee, the Gulf Refining Company, claims and asserts that it has a valid mineral lease "executed by T. D. Lewis and Annie Lewis, recorded in Oil Lease Book 2, Page 39", etc., and further, that said company has a valid lease from Jettie Windham, et al, also of record, and two other valid mineral leases therein referred to, and that the Gulf Refining Company accepts the Hudson lease "solely for the purpose of buying its protection" to the title and to all the oil that may be or has been produced from said land under the terms of the Lewis lease; that the lessee, the Gulf Refining Company, shall never be called upon to recede from that position, and that it shall be just as free to assert that the lessors in the Lewis lease and the other leases therein mentioned have valid titles to the whole of the lands covered thereby, and to all of the oil, gas and other minerals thereunder. It is expressly provided that

the complainants herein, the Hudsons, shall not be entitled to, and the (R. 609) lessee, the Gulf Refining Company, shall be under no obligation to pay to the complainants, "any of the royalties or any part thereof provided for herein, unless and until the suit entitled N. L. Hudson, et al, Complainants, vs. Gulf Refining Company, et al, Defendants, No. 398, Chancery Court of the First Judicial District of Jasper County, Mississippi, lessor shall have established by compromise settlement between the parties thereto, or by final decree of the court therein, that the lessor herein is the owner of the lands and minerals hereby leased and involved in said suit, or the owner of an interest therein." Thereby, the parties contracted and agreed, for a valuable consideration, to submit to the Chancery Court of the First Judicial District of Jasper County, in this particular suit, the all-important question of title as between the complainants on the one hand and the defendants on the other hand, and the question as to which group is entitled to the accumulated royalties and the royalties hereafter to accrue. By said contract, the parties have made this Honorable Court the final arbiter of all controversies between the parties hereto. The provisions of said protective lease inure to the benefit of all these defendants. They are referred to expressly. The royalties due them have been withheld, and they are looking to this Honorable Court to release those royalties to them. They have a direct interest in said contract, and respectfully submit that said contract was made for their benefit as well as for the benefit of the Gulf Refining Company. The execution and delivery of said protective lease was brought about by the filing of this suit, grows out of said litigation, refers to it and agrees

to be bound by the determination of this Honorable Court, and thereby these defendants have acquired a right during the progress of this litigation which is undertaken to be changed, modified or done away with by the motion herein filed to dismiss without prejudice, thereby delaying final determination of the issues presented by the pleadings in this cause, to the great damage and injury of all these defendants. (R. 610.) The lands involved in this litigation are commonly known as farm lands, and prior to the discovery of an oil field thereunder, could be utilized by hard labor in producing crops, but the development of oil, the drilling of several wells on the lands herein involved, and the piping of said oil has interfered tremendously with any profitable farming operations. The filing of an unjust suit has operated to withhold from those defendants owning and in possession of the lands from realizing on the royalties due them, and this Honorable Court has at least constructive possession of said royalties, with the right to determine ownership thereof in this particular cause, and the dismissal of this suit would embarrass and damage these defendants in realizing upon said royalties, and cause doubt and confusion as to their right thereto. Many witnesses having knowledge of the ownership and possession of the lands and being in position to give relevant testimony are advanced of age and one or more of them may die at any time and thereby further embarrass these defendants in producing before this Honorable Court the relevant and pertinent facts that would guide this Court to the right conclusion. The public records are in the Court House where this Honorable Court sits, and can be produced with less expense and less embarrassment and trouble than

would be required if this cause is tried in the Federal District Court, or some other tribunal. The venue is properly in this Court, where the lands are located, this suit being essentially one *in rem*. Defendants submit, therefore, that not only have the complainants contracted, for valuable consideration, that the issues be tried in this particular case and in this court, and are, therefore, estopped now to dismiss their cause, but the dismissal would deny to these defendants a valuable right guaranteed and vouchsafed by said contract, and furthermore, a dismissal would embarrass and delay these defendants in arriving at a prompt and righteous decision that would put all of these questions at rest and hasten the time when the defendants, T. D. Lewis and family, could (R. 611) realize upon the royalties due them.

3. On or about May 18th, 1945, the complainants herein, for valuable consideration, executed to the Tidewater Associated Oil Company, one of the defendants herein, a so-called protective mineral lease similar in all respects to the lease hereinabove referred to as being executed in favor of the Gulf Refining Company. Said lease was filed for record June 5th, 1945 and is of record in Book 20, Page 391 of the records of deeds and conveyances in the First Judicial District of Jasper County, Mississippi, which is here referred to, and a true copy thereof filed herewith as Exhibit "B", and asked to be taken as a part of this answer as fully as if copied herein. Paragraph 12 thereof contains provisions almost identical with the provisions of Paragraph 14 in the protective lease executed in favor of the Gulf Refining Company. These defendants refer to and rely upon said provisions and reaver

thereto all facts hereinabove alleged with reference to the Gulf Refining Company lease. By the terms of Paragraph 12, this Honorable Court is made the final arbiter as to the alleged claim of the complainants to the lands herein involved, and to their right to royalties under the producing wells on said lands, and particularly as to the royalties due by the Tidewater Associated Oil Company. It is therein expressly agreed and understood that the complainants' right to any royalties would abide and be controlled by the decision of this Honorable Court in this very suit. Said contract necessarily inures to the benefit of T. D. Lewis and his family, defendants herein, and others of their co-defendants, and the complainants have no right to dismiss this suit without prejudice and thereby leave hanging in doubt the right of these defendants to realize upon said accumulated royalties and the royalties to accrue. It follows that these defendants have obtained rights which will be taken away from them by the dismissal of this suit, and they jointly and severally object thereto and they reaver the damaging consequences which would result as to the Tidewater (R. 612) Associated Oil Company lease, the same as hereinabove averred with reference to the Gulf Refining Company lease.

4. Defendants furthermore submit to the Court that the Gulf Refining Company, one of the defendants herein, has a cross-bill which should be maintained and prosecuted, to validate the mineral lease executed by the defendants, T. D. Lewis and Mrs. Annie Lewis, and for other relief, and that the dismissal of the original bill would not operate to dismiss the cross-bill. The defendants, T. D. Lewis and family, are directly interested in said cross-bill, and have

the right to intervene therein, to the end that the lease executed by the said T. D. Lewis and Mrs. Annie Lewis, should be validated by this Honorable Court, at the request and suit of the Gulf Refining Company on its cross-bill. If said cross-bill is retained and the Court permits a dismissal of the original bill, it would create confusion as to the issues between all parties hereto. It is important to all of the parties that the rights of the Lewis family be settled in this proceeding. The mineral rights of the Gulf Refining Company grow out of their conveyance and their rights are so inter-related with the rights of the Gulf Refining Company and the rights of the Tidewater Associated Oil Company, that it would be difficult to proceed without having the whole issue determined in one cause.

Wherefore, for reasons assigned, these defendants, jointly and severally, object to the sustaining of the motion of the complainants to dismiss the original bill, as amended, without prejudice, and ask this Honorable Court to proceed to a final determination of this cause without further delay. * * *

SUPPLEMENTAL ANSWER OF SAME DEFENDANTS TO MOTION TO DISMISS.

(R. 695.) Now come T. D. Lewis, * * * some of the defendants in the above styled cause, and jointly and severally file this supplemental answer to the motion of the complainants to dismiss the original bill of complaint and all amendments thereto, without prejudice, supplementing their answer to said motion heretofore filed in

said cause, and by way of further objections to the dismissal of said original bill of complaint and all amendments thereto, without prejudice, would show unto the court the following facts, to-wit:

1. On March 8, 1945, the complainants in this cause filed a motion praying the court to grant a decree or order requiring the defendants in said cause, including these defendants, to submit for inspection of the counsel of complainants certain books, records, documents, and information alleged to be in the possession of the defendants, including affidavits, opinions of title, abstracts, chains of title, original instruments, correspondence, and other (R. 696) books, records, and documents, statements, instructions, and correspondence between the defendants and their employees relating to the merits of this action and proceeding, and the defense thereto, and all information that the defendants had compiled in the matter of preparation for the defense of this action.

That a hearing was had on said motion before the Chancellor, in vacation, at Meridian, Mississippi, on March 15, 1945, at which hearing the court entered a decree allowing counsel for complainants to examine the originals of certain instruments and a certain abstract of title, which were then of record in the office of the Chancery Clerk at Paulding, Mississippi, but overruled the said application and motion as to all other parties and as to all other books, papers, records, and documents referred to in said motion.

A true copy of said motion as to the defendant, T. D. Lewis, which is the same motion as was made as to the other defendants, and a true copy of said decree are each made exhibit to this answer, and the originals thereof will be presented at the hearing hereof.

2. By this decree these defendants acquired a valuable right in this lawsuit in that the cause has proceeded to such a point, and such steps have been taken, that the defendants have secured some substantial rights which would be destroyed by dismissal, and it should not be permitted.

The complainants, prior to the filing of this motion to dismiss in this court, filed separate actions against several of these defendants in the District Court of the United States for the Eastern Division of the Southern District in Mississippi, which suits are grounded upon the same alleged facts, and upon similar allegations as in this suit, No. 398, in this court and the complainants are attempting to have this cause dismissed in this court so that they may proceed against these and other defendants in said Federal Court. The said complainants, if this cause is dismissed in this court, and they are allowed to proceed against these defendants in said Federal Court, will again attempt to require these defendants to furnish the (R. 697) complainants or their counsel with the information and affidavits, memoranda, etc., compiled by these defendants and other defendants for their defense of this suit, which has been refused the said complainants by the said decree of this court upon said motion in March, 1945. It is respectfully submitted that it would be unfair and unjust and contrary to the general public policy to permit a dismissal of the

original bill and the amendments thereto in this cause, without prejudice, which would have the effect of changing the strategical position of the parties.

Wherefore, for the reasons assigned, these defendants jointly and severally object to the sustaining of the motion of the complainants to dismiss the original bill and all amendments thereto without prejudice, and respectfully pray this Honorable Court to proceed to a final determination of this cause without further delay. * * *

(R.754.) Whereupon, the Defendants in contest of said motion offered and introduced the following:

(R. 755.) By Mr. Buchanan:

The defendants introduce deed book 18, pages 479-485, showing protective mineral lease from N. L. Hudson, et al, to Gulf Refining Company, dated December 15, 1944, said instrument being in words and figures as follows, to-wit:

OIL, GAS & MINERAL LEASE.

Dated: Dec. 15, 1944.

Filed: Dec. 21, 1944: 4:15 PM.

Recorded:

Recorded:

Jasper County, Miss., 1st Dist.

From Original Instrument.

Mrs. Lloyd K. Tilgham, Graydon M. Blackmon, Mrs. Gertrude Hudson Ellison, Mrs. Lessie Hudson Smith, May I. Hudson Thompson, Mrs. Grace Hudson Hyde, Mrs. Exie Hudson, Philip L. Hudson, Charles A. Hudson, E. S. Blackmon, Mrs. May Hudson, Mrs. Ruby Mae Mitchell, and N. L. Hudson, sole existing heirs at law of Noah L. Hudson and Mrs. Mary E. Hudson, both deceased; and L. F. Easterling and L. C. Franklin, Lessor,

to

Gulf Refining Company, Lessee.

State of Mississippi,
County of Jasper.

Know All Men By These Presents:

That Mrs. Lloyd K. Tilgham, Graydon M. Blackmon, Mrs. Gertrude Hudson Ellison, Mrs. Lessie Hudson Smith, May I. Hudson Thompson, Mrs. Grace Hudson Hyde, Mrs. Exie Hudson, Philip L. Hudson, Charles A. Hudson, E. S. Blackmon, Mrs. May Hudson, Mrs. Ruby (R. 756) Mae Mitchell, and N. L. Hudson, who represent and warrant that they are the sole existing heirs at law of Noah L. Hudson and Mrs. Mary E. Hudson, both deceased, late of Jasper County, Mississippi; and L. F. Easterling and L. C. Franklin, hereinafter called "Lessor" (whether one or more) hereby grants to Gulf Refining Company, hereinafter called "Lessee", the exclusive right to explore the land hereinafter described for mineral indications, to drill and mine thereon for oil, gas, sulphur and other minerals,

and to produce and appropriate any or all of same therefrom; the right to use, free of charge, oil, gas and water from the land in conducting operations thereon and in treating to make marketable the products therefrom; the right to construct and use on said land telephone, telegraph and pipe lines and facilities for the transportation and storage of minerals produced therefrom, as well as salt water; the right to construct and use such canals and roads as are necessary for Lessee's operations hereunder; the right to remove from the land at any time any property placed by Lessee thereon, and all rights necessary to the full enjoyment of this lease; all, however, during the term and subject to the conditions hereinafter stated.

The said land is situated in First District of Jasper County, Mississippi, and is particularly described as follows, to-wit:

East half of Southeast quarter (E½ of SE¼), Section 19; Southwest quarter of Southwest quarter (SW¼ of SW¼), Section 20; Northwest quarter (NW¼), of Section 29; Southeast quarter of Northeast quarter (SE¼ of NE¼), of Section 30; all in Township one (1), North, of (R. 757) Range Thirteen (13) East, comprising 320 acres.

For the purpose of calculating the payments hereinafter provided for, the superficial area of the land covered by the above description is estimated to comprise 320 acres.

1. This lease is effective as of the date January 1, 1940, and shall expire January 1, 1955 (hereinafter called "primary term") unless oil, gas or other mineral is being

produced in commercial quantities or operations for drilling or production are being conducted on or from the above described land or any portion thereof on said expiration date of January 1, 1955, and shall continue in effect so long thereafter as such production is being had or operations for drilling or production is being conducted in accordance herewith.

2. Lessee may at any time execute and deliver to Lessor or to the depository hereinafter named, or place of record, a release or releases covering any portions of the land and thereby surrender this lease as to such portion or portions and be relieved of all obligations as to the land surrendered. Any notice, release, or communication to Lessor may be given to Lessor personally, or by letter addressed to Lessor, care of Lamar F. Easterling, 1406 Deposit Guaranty Bank Building, Jackson, Mississippi. The Deposit Guaranty Bank & Trust Company of Jackson, Mississippi, is named as depository hereunder.

3. If prior to the discovery of oil on the land and at a time when Lessee is not actually engaged in drilling operations on the land, a well producing as much as two hundred (200) barrels of oil per day for thirty (30) consecutive days is brought in on (R. 758) adjoining land and within two hundred (200) feet of any outside boundary of the land then held hereunder, Lessee shall, within a reasonable time, begin, and with reasonable diligence, prosecute the drilling of a well on the land then held hereunder in an honest effort to discover oil in paying quantities.

4. After beginning operations on the land, and prior to discovering any mineral in paying quantities thereon, Lessee may maintain Lessee's rights in effect for so long as it pleases, even beyond the primary term, by continuing such operations without lapse of more than sixty (60) days between cessation of operations on one well and the beginning of operations for drilling another.

5. After discovery of any mineral in paying quantities on the land, all of Lessee's rights shall remain in effect so long as any mineral is produced in paying quantities from the land; and if such production should thereafter cease for any cause after the expiration of the primary term, Lessee may maintain all rights hereunder by beginning re-working operations or additional drilling within sixty (60) days after such cessation.

6. After the discovery of any mineral in paying quantities, Lessee shall be exempt from loss or forfeiture of this lease in whole or in part, except after final judicial ascertainment that Lessee has failed to perform its duty hereunder, and thereafter Lessee shall have a reasonable opportunity to perform and prevent such loss or forfeiture, and in event of final loss or forfeiture, there shall be reserved to Lessee all producing and drilling wells with forty (40) acres surrounding each well to be designated by Lessee.

(R. 759.) 7. Subject to and contingent upon the provisions of paragraph 14 hereof, Lessor shall be entitled to the following royalties; one-eighth (1/8) of the oil produced and saved and not used for fuel in conducting

operations on the land or in treating to make marketable the products therefrom; one-eighth (1/8) of any waste oil from the land or coming on to the land from other sources, if utilized; on gas, including casinghead gas or other gaseous substance, produced from said land and sold for purposes other than the manufacture of gasoline, the market value at the well of one-eighth (1/8) of the gas so sold. If such gas is sold for the manufacture of gasoline therefrom, the royalty shall be one-eighth (1/8) of the amount realized from such sale. In the event said gas is used off the lease or in the manufacture of gasoline therefrom by Lessee, the royalty shall be one-eighth (1/8) of the market value of such gas at the well. The royalty for each well producing gas only shall be Two Hundred and No/100 Dollars ($200.00) each year until such time as the gas from such gas well shall be utilized in the manufacture of gasoline or sold off the land; on sulphur fifty cents (50¢) for each long ton marketed; on salt three cents (3¢) for each long ton marketed; and a reasonable royalty on any other mineral produced in quantities deemed by Lessee to be paying. These royalties are based upon the ownership of the entirety of the mineral rights by Lessor. If, in any event or at any time, Lessor owns less than such entirety of the mineral rights in any portion of the land from which any mineral may be produced, such royalties shall be paid only in the proportion that Lessor's interest in the mineral rights in such portion bears to (R. 760) the entirety of the mineral rights therein.

8. The oil royalty shall be delivered to Lessor at Lessor's option into storage tanks provided by Lessor at

Lessor's expense on the land retained, or into any pipe line connected with the well; if Lessee provides such pipe line, Lessee may purchase such royalty oil at its posted market price for oil of like kind and quality from the same field; if no storage tanks are provided by Lessor and there is no pipe line connected with the well, Lessee shall have the optional right to purchase the royalty oil and to account to Lessor at the market price at the well.

9. Lessee shall bury its pipe lines below plow depth when requested by Lessor. No well shall be drilled nearer than two hundred (200) feet to the house or barn on said land without the written consent of Lessor, and Lessee shall be responsible for all damages caused by Lessee's operations other than damages necessarily caused by the exercise of the rights herein granted.

10. If the estate of either party hereto is assigned, and the privilege of assigning in whole or in part is hereby expressly allowed, the covenants hereof shall extend to their heirs, executors, administrators, successors or assigns, but no change in the ownership of the land or the minerals in and under the same or assignment of rentals or royalties shall be binding on Lessee unless Lessee shall have been furnished thirty (30) days before payment hereunder of such royalties with certified copies of recorded instruments showing the muniments of title. If six or more parties become entitled to royalties hereunder, Lessee may withhold payments thereof unless and until furnished with a recordable instrument (R. 761) executed by all of such parties designating an agent to receive payment for all.

11. If by reason of labor troubles at manufacturing plants, or as the result of exercise of rights by governmental authority, Lessee is delayed or hindered in obtaining material or equipment necessary in drilling or completing a well, or if as a result of war, flood, storm, fire, blowout, differences with workmen, requisition or order of governmental authority, Lessee is prevented from commencing or completing the drilling of any well or wells, then in any such event Lessee shall be relieved during the period of such delay or the continuance of such preventing cause from all obligations, whether express or implied, in this lease contained to commence or complete the drilling of any well or wells; and Lessee shall not be liable to Lessor in damages for failure to drill any such well during the time Lessee is relieved from the obligation so to do provided, this paragraph shall not have the effect of altering the condition under which this lease will remain in force beyond its primary term, unless at the time of expiration of the primary term Lessee is prohibited from drilling upon the leased premises by governmental orders in which event the primary term shall be extended automatically from year to year until the first anniversary hereof occurring 90 or more days following the cancellation of such governmental order; but inability to commence operations for drilling, and to drill, a well shall not relieve Lessee from the requirement of paying rentals if Lessee desires to continue this lease in force during any extension of the primary term, in absence of production, drilling and reworking operations, said rentals, for the purpose of this clause, after (R. 762) January 1, 1955, being fixed at the rate of One ($1.00) Dollar per acre per year, when lawfully demandable. In determining

whether Lessee has used reasonable diligence wherever required by any obligation of this lease, express or implied, the causes of delay in this paragraph set forth shall not be exclusive of any other cause or causes which may exist. If for any period or periods of time after oil or gas has been discovered on the leased premises same is not produced because Lessee is unable to obtain and install by reason of any cause set forth herein, any equipment or material necessary for handling or transporting such production, then nevertheless during such period or periods of time it shall be considered for the purpose of continuing this lease in effect under the terms hereof that production of oil or gas is being had upon the leased premises.

12. Lessee is hereby given the right to pool or combine the acreage covered by this lease or any parts thereof with other land, lease or leases in the immediate vicinity thereof, when in Lessee's judgment it is necessary or advisable to do so in order to promote the conservation of oil, gas or other minerals, such pooling to conform to drilling units prescribed by any applicable order of any governmental authority having jurisdiction of the subject matter, if such order be issued. Lessee shall record in the appropriate Records of the County in which the leased premises are situated, an instrument describing the pooled acreage. Operations for drilling or production on any part of a drilling unit composed in whole or in part of the land above described shall be considered as operations for drilling or production on land covered by this lease and the entire acreage constituting such (R. 763) unit or units shall be treated for all purposes as if the same

were included in this lease, except that in lieu of the royalties elsewhere herein specified Lessor shall receive on production from each of such units that proportion of the royalties herein stipulated that the amount of his ownership in the mineral rights in the acreage placed in the particular unit involved bears to the entirety of the mineral rights in such unit.

13. Lessor only warrants specially and shall not be obligated to refund the bonus received or any part thereof unless and except there be a breach of the special warranty occurring by claims of persons claiming by, through, or under the Lessor herein. In the event Lessor's title is disputed by suit or otherwise, Lessee shall have the right to withhold the payment of royalties provided for hereunder until the final determination of any such suit or dispute favorable to Lessor and shall have the right in such event to maintain this contract in force by giving notice to Lessor, or to the depository hereinabove named, of its intention to withhold such royalties. Lessee shall have the right to acquire or lease the interest of any party in said land and minerals which any such party claims is not covered by this instrument.

14. It is understood and agreed notwithstanding any provision of this instrument apparently to the contrary that Lessee does not in any way admit that Lessors, or any of them, have any right, title or interest in or to the lands, or any of them, covered hereby, or to any of the oil, gas and other minerals in and under or that may be produced therefrom, (unless and until Lessor establishes some title to or interest therein either by compromise

settlement or final decree in the suit entitled N. L. Hudson (R. 764) et al, Complainants, vs. The Gulf Refining Company et al, defendants, No. 398, Chancery Court for the First Judicial District, Jasper County, Mississippi), but on the contrary Lessee claims and asserts that it has good and valid title to all of the oil, gas and other minerals in and under and that may be produced from the land described in this lease by virtue of oil, gas and mineral leases theretofore executed by T. D. Lewis and Annie Lewis, recorded in Oil Lease Book 2, page 39; by Jettie Windham, G. R. Windham, Carrie Husband and Norman Husband, recorded in Oil Lease Book 2, page 251; by Margiree Jones and Abb Jones, recorded in Oil and Gas Book 2, page 213, and by Mason Newell, recorded in Oil and Gas Book 6, pages 547-548, all references are to the records of the First Judicial District of Jasper County, Mississippi.

It is further expressly agreed that Lessee has accepted and does accept this lease from Lessor not in recognition of the title or claim asserted by Lessor, but it has accepted and does accept this lease solely for the purpose of buying its protection to the title or titles to the land covered hereby, together with all the oil, gas and other minerals thereunder, or that may be or have been produced from said land under the terms of the hereinabove mentioned leases; and Lessee shall never be called upon to recede from its position that it now has and owns valid mineral leases covering all of said lands; and it shall be just as free hereafter as it has been heretofore to assert that its Lessors named in this paragraph have and had good and valid titles to the whole of the lands covered

hereby and to all of the oil, gas and other minerals thereunder at the respective dates of execution of said leases; and it is further agreed that the continued assertion of such contention by Lessee (R. 765) shall in no manner be deemed or construed a repudiation of the terms of this lease.

And, further, notwithstanding any provisions of this lease, apparently to the contrary, it is agreed and understood that Lessor shall not be entitled to and Lessee shall be under no obligation to pay Lessor any of the royalties, or any part thereof, provided for herein unless and until in the suit entitled N. L. Hudson, et al, complainants, vs. The Gulf Refining Company, et al, defendants, No. 398, Chancery Court for the First Judicial District, Jasper County, Mississippi, lessor shall have established by a compromise settlement between the parties thereto, or by final decree of the court therein, that the Lessor herein is the owner of the lands and minerals hereby leased and involved in said suit or the owner of an interest therein.

15. Lessee shall have the right at any time to discharge in whole or in part any tax, mortgage or other lien upon said land or mineral rights therein, including redemption from tax sale or adjudication and be subrogated to the rights of the holders thereof, and thereafter Lessee shall have the right to retain all rentals and royalties provided for hereunder, or any portion or portions thereof, and apply same towards reimbursements of Lessee for such payment upon giving notice of its intention to so apply such payments to Lessor or to depository named herein.

Lessor acknowledges receipt of Ten ($10.00) Dollars and other considerations, paid by Gulf Refining Company, as the full and adequate consideration for every right granted herein. The property above described is not homestead of Lessor.

(R. 766.) Thus Done, Read and Signed on this the 15 day of Dec., 1944.

(Signed)	MRS. LLOYD K. TILGHMAN,
	By PHILIP L. HUDSON,
	Atty. in fact.
(Typed)	MRS. LLOYD K. TILGHAM,
(Signed)	GRAYDON M. BLACKMON,
(Typed)	GRAYDON M. BLACKMON,
(Signed)	PHILIP L. HUDSON,
(Typed)	PHILIP L. HUDSON
(Signed)	CHARLES A. HUDSON,
(Typed)	CHARLES A. HUDSON,
(Signed)	MRS. MAY HUDSON,
(Typed)	MRS. MAE HUDSON,
	(Mrs. Mae Hudson as typed has been changed to Mrs. May Hudson. The margin of the instrument is here initialed E. Q. H.)
(Signed)	MRS. RUBY MAE MITCHELL,
(Typed)	MRS. RUBY MAE MITCHELL,
(Signed)	N. L. HUDSON,
(Typed)	N. L. HUDSON,
(Signed)	L. F. EASTERLING,
(Typed)	L. F. EASTERLING,

(Signed) L. C. FRANKLIN,
(Typed) L. C. FRANKLIN,
(Signed) GRACE HUDSON HYDE,
(Typed) MRS. GRACE HUDSON HYDE,
(Signed) By E. Q. HYDE,
Attorney-in-fact,
(Signed) By CHARLES A. HUDSON,
Attorney-in-fact,
(Signed) By N. L. HUDSON,
Attorney-in-fact,
(Signed) E. S. BLACKMON,
(Typed) E. S. BLACKMON,
(Signed) By E. Q. HYDE,
Attorney-in-fact,
(Signed) By CHARLES A. HUDSON,
Attorney-in-fact,
(Signed) By N. L. HUDSON,
Attorney-in-fact,
(R. 767) (Signed) GERTRUDE HUDSON
ELLISON,
(Typed) MRS. GERTRUDE HUDSON
ELLISON,
(Signed) By E. Q. HYDE,
Attorney-in-fact,
(Signed) By (C. A. HUDSON),
CHARLES A. HUDSON,
Attorney-in-fact,
(Signed) By N. L. HUDSON,
Attorney-in-fact,
(Signed) MRS. LESSIE HUDSON SMITH,
(Typed) MRS. LESSIE HUDSON SMITH,

(Signed) By E. Q. HYDE,
Attorney-in-fact,
(Signed) By CHARLES A. HUDSON,
Attorney-in-fact,
(Signed) By N. L. HUDSON,
Attorney-in-fact,
(Signed) MAY I. HUDSON THOMPSON,
(Typed) MAY I. HUDSON THOMPSON,
(Signed) By E. Q. HYDE,
Attorney-in-fact,
(Signed) By CHARLES A. HUDSON,
Attorney-in-fact,
(Signed) By N. L. HUDSON,
Attorney-in-fact,
(Signed) MRS. EXIE HUDSON,
(Typed) MRS. EXIE HUDSON,
(Signed) By E. Q. HYDE,
Attorney-in-fact,
(Signed) By CHARLES A. HUDSON,
Attorney-in-fact,
(Signed) By N. L. HUDSON,
Attorney-in-fact.

(Acknowledgments omitted.)

(R. 773.) By Mr. Buchanan:

We offer deed book 20, page 391, et seq., showing protective lease from N. L. Hudson, et al to Tidewater Associated Oil Company, dated June 5, 1945, said instrument being in words and figures as follows:

(Exhibit omitted.)

(R. 785.) By Mr. Cameron:

Complainants object to the introduction of these leases in evidence; they are *res inter alios acta,* and generally incompetent, irrelevant and immaterial.

By the Court:

Overruled.

GARNER W. GREEN, called as a witness, for and on behalf of defendants, being duly sworn, testified as follows, to-wit:

Direct Examination.

By Mr. Stevens:

Q. Please state whether or not any of the royalties have been paid under the leases executed to Gulf Refining Company?

A. No, sir.

Q. Has Gulf paid royalty on any of this land involved in this suit?

A. No, sir, according to my information.

Q. The reason it has not been done is because of this litigation?

By Mr. Cameron:

We object to that.

By the Court:

Overruled, if you are familiar with the facts.

A. Where a title is in controversy royalty is not paid, especially where there is a law suit.

(R. 786.) By the Court:

Is there any other controversy except this one?

A. I can't answer, I have not examined the records, but I do know about this one.

By Mr. Buchanan:

That is all.

Cross Examination.

By Mr. Cameron:

Q. Mr. Green, it is a fact if the Gulf Refining Company has notice from any source that a title is questioned it does withhold payment of royalty, whether there be a suit or any other question?

A. Mr. Cameron, that lies without my power. I say normally that would be a question that would be left to the general counsel, his opinion would control. As a general policy I would say that is correct.

Q. As I understand then royalties are payable if oil is taken out of the land involved in this litigation, but that the money is being held by the Gulf Refining Company, is it?

A. Yes.

Q. There has been offered in evidence over complainants objections lease given by the Hudsons, the complainants in this case, to Gulf Refining Company. The consideration for that lease was paid by the Gulf Refining Company, was it not?

A. Yes, sir.

Q. And that consideration was $50,000.00 cash?
A. In the form of a draft.

(R. 787.) By Mr. Cameron:
That is all.

Re-Direct Examination.

By Mr. Stevens:
Q. Is it your understanding these royalties have not been paid the Lewis family and other owners of the land is because of the pendency of this law suit?
A. So far as I know it is. There may be other facts but so far as I know, I don't know it.
Q. You do know that this litigation was referred to in the protective lease?
A. Yes.

By Mr. Cameron:
We object; the lease speaks for itself.

By the Court:
Sustained.

By Mr. Stevens:
Q. You are of counsel for Gulf Refining Company?
A. In certain cases.
Q. Are you leading counsel for Gulf Refining Company in this litigation?
A. I am of counsel for Gulf Refining Company, but associated with other counsel with certain authority.

By the Court:

Q. Mr. Green, has Gulf Refining Company deposited any money in this Court?

A. No, sir, the lease does not require that they deposit money.

(Witness excused.)

(R. 788.) WILLIAM LEWIS, called as a witness, for and on behalf of defendants, being duly sworn, testified as follows, to-wit:

Direct Examination.

By Mr. Stevens:

Q. Your name is William Lewis?

A. Yes.

Q. You are a son of Talmage D. Lewis?

A. Yes, sir.

Q. Are you directly interested in the land involved in this litigation?

A. Yes.

Q. You have an interest in the royalties?

A. Yes.

Q. State whether or not Gulf Refining Company has paid any royalties for the lease they hold?

A. No.

Q. None of it at all?

A. No.

Q. What about Tidewater Associated Oil Company?

A. They have not paid anything.

Q. So the royalties provided in the mineral lease are being accumulated, not paid to any of you folks?

A. That is right.

Q. Why is it not paid, Mr. Lewis?

By Mr. Cameron

We object.

(R. 789.) By the Court:

Overruled.

By Mr. Stevens:

Q. What reason did they assign?

A. Well, this law suit, they would not do anything until this law suit was settled.

Q. Until the law suit was settled?

A. Yes, sir.

Cross Examination.

By Mr. Cameron:

We move to exclude the answer as incompetent, irrelevant and immaterial.

By the Court:

Overruled.

By Mr. Cameron:

No questions.

(Witness excused.)

By Mr. Buchanan:

We offer a decree of the Court of March 15 on the motion to examine certain documents and to secure certain correspondence, and certain proof of possession, certain proof of heirship that the defendants had prepared for the defense of the said motion.

By Mr. Cameron:

We have no objections.

(R. 790.) By Mr. Buchanan:

It is a part of the record any way.

Defendants Rest.

Defendants having rested whereupon Complainants in support of their motion to dismiss offered and introduced the following:

(R. 791.) By Mr. Cameron:

May we agree that the documents submitted in favor of complainants, and the decree just introduced in evidence, are all matters of record in the office of the Chancery Clerk of Jasper County, Mississippi?

By Mr. Buchanan:

Yes.

By Mr. Cameron:

We offer in evidence a letter from Wilbourn, Miller and Wilbourn to W. S. Welch, dated January 5, 1945,

and ask that same be identified as Exhibit 1 to Complainants' testimony.

(Exhibit omitted.)

(R. 794) By Mr. Cameron:

We offer in evidence, if the Court please, copies of the complaints filed by the complainants, N. L. Hudson, et al, as follows:

N. L. Hudson, et al versus Mason Newell, et al, number 270, in the District Court of the United States for the Eastern Division of the Southern District of Mississippi;

N. L. Hudson, et al versus T. D. Lewis, et al, number 271;

N. L. Hudson, et al versus Jettie Kelly Windham, et al, number 272;

N. L. Hudson, et al versus Margiree Jones, et al, number 278, and ask to have them identified as Exhibits 2, 3, 4 and 5 to complainants testimony. Exhibits omitted.)

(R. 850) By Mr. Cameron:

That is all.

Complainants Rest.

(R. 851) By the Court:

Gentlemen, after listening to all of the argument my mind is not free from doubt. I would like to make a little independent investigation myself.

I will give an opinion and a decree next week sometime.

(R. 721) DECREE OVERRULING MOTION TO DISMISS.

This cause having been heard at the regular January 1946 term, and having been submitted to be decided in vacation, on motion of complainants for leave to dismiss their bills without prejudice, after due consideration it is ordered and decreed that said motion be and the same is hereby denied and overruled.

Ordered this January 18, 1946.

(S.) GEO. B. NEVILLE,
Chancellor.

Filed Jan. 21st, 1946. J. J. Denson, Clerk, by Birdie D. Brame, D. C. E. M. B. #3, Page 197.

* * * * * *

(R. 730.) In Re: N. L. Hudson, et al,
vs.
Gulf Refining Co., et al. #398.

First District, Jasper County.

Gentlemen:

I have called a special term of the Chancery Court of the First District of Jasper County beginning the first Monday in May. The above case will be triable at that term.

It has come to my knowledge that certain parties interested in the case have made threats against certain litigants, witnesses and attorneys. Of course, I have no personal knowledge that any such threats have been made.

But it is my duty, as I see it, to see that all officers of the court, litigants and witnesses are protected.

Section 4240 of the Code of 1942 requires the Sheriff to attend all sessions of the court "with a sufficient number of deputies or bailiffs". I am directing the Sheriff to appoint 12 deputies from the western part of Jasper County, men of character and courage, to attend the special term of court, and it is my purpose to require the Sheriff and his deputies to search every person who comes in the court room. I want every one who is connected with this case to understand that it is my purpose to see that they are protected while attending court.

I am writing you confidentially for the reason that I do not care that any notice be given of this action to the public.

(R. 731.) If you have any suggestions to make I will be glad to hear from you.

With regards and best wishes, I am,

Your friend,

(S.) GEO. B. NEVILLE,

(T.) GEO. B. NEVILLE,

Chancellor.

Filed May 6, 1946. J. J. Denson, Clerk.

* * * * * *

(R. 724.) Come the complainants, and, insisting that this Court is without jurisdiction to proceed further in this

case, and not entering their appearance except to file this protest in response to the letter of the Judge of this Court, nevertheless, having through their attorneys received a letter written by Honorable George B. Neville, Chancellor, stating that he had called a special term of this Honorable Court, and stating further that this case will be triable at that term (a photostatic copy of which letter is attached as a part hereof), they file this their protest upon the convening of said term and object to a trial being had, or any other proceedings or action taken, at said special term of court, and say:

I.

They voluntarily entered this Honorable Court and filed their bill of complaint, and submitted the issues set forth in their pleadings to this Honorable Court, and pursued said case at great expense to themselves, all in good faith; and that no process of any kind has ever been served on them in this case, and no relief has ever been asked against them, and no possession has ever been taken of any land or any moneys, or any matter or thing involved in this suit, and that the only jurisdiction this court has ever had was conferred on it by the voluntary acts of the plaintiff in filing (R. 725) this suit and pursuing it as reflected by the record in the case.

II.

On December 12, 1945, pursuant to the right given them by the Constitution, statutes and laws of the State of Mississippi, and the Constitution, statutes and laws of the

United States, they filed their motion to dismiss this case without prejudice, and thereby withdrew their appearance in this court and withdrew from this Honorable Court any jurisdiction it ever had to proceed herein, except to enter an order dismissing the same without prejudice as prayed by the complainants. Notwithstanding the absolute right of the complainants to dismiss without prejudice the case brought by them, this Honorable Court entered upon a hearing of said motion to dismiss, and, on January 14, 1946, entered its order taking said motion under advisement for decree in vacation, which order is entered in Minute Book 3, page 177, of the minutes of this court; and after the adjournment of the January 1946 term of this court, by decree dated January 17, 1946 and recorded on said minutes in Minute Book 3, page 196, entered its order in vacation, dated January 18, 1946, which order is recorded in Minute Book 3, page 197, of said minutes, overruling complainants' motion to dismiss without prejudice, which orders are referred to and made a part hereof.

Before the entry of any of said orders, this Honorable Court was advised that complainants had, on December 11, 1945, filed four actions in the District Court of the United States for the Eastern Division of the Southern District of Mississippi, embracing the same issues and subject matter as those involved in this suit, and copies of the complaints in said actions were exhibited to this Honorable Court, said actions so brought in said District Court of the United States being styled as follows:

Civil Action File #270—N. L. Hudson, et al v. Mason Newell,

Civil Action File #271—N. L. Hudson, et al v. T. D. Lewis,

Civil Action File #272—N. L. Hudson, et al v. Jettie K. Windham, et al,

Civil Action File #278—N. L. Hudson, et al v. Margiree Jones, et al.

(R. 726) III.

(a) Before the entry of said orders above mentioned by this Honorable Court, the defendants in said four civil actions in said Federal Court had filed their motions to dismiss said actions, and each of them, because of want of jurisdiction, and to dismiss or abate the same because of the pendency of this suit, and to dismiss because of want of indispensable parties or of the jurisdictional amount, and for other causes, and had also filed motions to arrest the taking of depositions in said actions by these complainants as plaintiffs therein.

(b) Thereafter plaintiffs filed their second and third counts in each of said four actions in the United States District Court, and defendants therein filed their supplemental motions to dismiss and to abate said second and third counts, and all of said motions were submitted to the said United States District Court, and the parties engaged in extended argument, and the said District Court of the United States entered its order in each of said cases overruling all of the motions of the defendants and entered its Findings of Fact and Conclusions of Law in

each of said cases. Plaintiffs file, as exhibits hereto, copies of the second and third counts and order allowing same, the order entered by the court and Findings of Fact and Conclusions of Law on all of the said motions of the defendants, all duly certified as such proceedings were had in Case No. 271, styled "N. L. Hudson et al, v. T. D. Lewis, et al". Identical action was taken in each of the other cases, and the pleadings filed were substantially identical, and complainants now file said pleadings in only one of said actions for the sake of brevity and to avoid unnecessary prolixity and costs.

(c) Defendants in said four civil actions in the United States District Court have, since the overruling of the said motions, filed their answers, aggregating more than 100 pages, and all of said actions are at issue.

(R. 727.) (d) Plaintiffs have, since the overruling of the motion of defendants seeking to arrest the taking of depositions, proceeded with the taking of depositions, and have taken several depositions and are pressing said actions for trial, and proceeding with full diligence towards getting said actions to trial at the first possible moment.

(e) Defendant, Gulf Refining Company, which has taken the lead for the defendants in said four actions in the United States District Court, has filed interrogatories to the plaintiffs aggregating more than 400 pages of typewritten matter; and the parties to said actions are making ready to try the same in the said United States District Court, and said actions will come on for trial within a

reasonable time, and will be disposed of by said United States District Court which has assumed full jurisdiction thereof, and which is fully prepared to go forward with and decide all of the issues involved in said actions, being the same issues as those involved in this case.

IV.

(a) The above mentioned civil actions in the United States District Court are brought on the ground of diversity of citizenship between complainants herein and the defendants named in said civil actions; and jurisdiction of such proceedings is conferred upon the United States District Court by Art. III, Sec. 2, of the Constitution of the United States and by Sec. 24 of the Judicial Code (28 US Code Annotated 41(1)); and the jurisdiction of the said United States District Court to hear and determine the controversy between the complainants herein and the defendants in said civil actions is not affected by any act or thing done or performed in this court; so that, as to the controversies existing between said complainants and said defendants, any proceedings had herein will be *moot* and without force and effect. In addition to the other matters herein mentioned, in order for complainants to appear and prosecute this suit (R. 728) in this court, complainants would be put to great expense, trouble, harrassment and delay, and to no avail and without any just reason, cause or excuse.

(b) Said District Court of the United States is, as aforesaid, proceeding with the trial of said issues, and is ready and able to proceed with such trial free of any

atmosphere of threats or intimidation or oppression, and under such circumstances that the witnesses and all who engage in the trial may perform their respective parts without fear of violence, and without intimidation or oppression.

(c) Plaintiffs are non-residents of the State of Mississippi and have the right guaranteed by the Constitution and Laws of the United States to have their persons and valuable property rights protected by the courts of the United States.

V.

If this court should fail to recognize and give effect to the absolute right of the complainants herein to dismiss their case without prejudice and to submit their rights to the United States Courts, or should attempt to take any action or proceedings or enter any decree at this term of court, or should attempt to require these complainants to go to trial in the cause or to proceed further therein, all such attempted action would be to deny to the complainants rights vouchsafed them by the Constitution and Laws of the United States and rights conferred upon them by Sec. 24 of the United States Judicial Code and Art. III, Sec. 2, of the Constitution, and would be to deprive them of their property without due process of law, and to deny to them the equal protection of the laws, as guaranteed by Art. XIV of the Constitution, and would be an illegal and unwarranted divesting of the jurisdiction of the District Court of the United States, aforesaid, the benefit and protection of all of which constitution and laws and

jurisdiction of the United States and its courts is specifically claimed by the complainants.

(R. 729.) Wherefore, complainants, and each of them, object to any action being taken herein by this Honorable Court, except to recognize and give effect to the dismissal without prejudice of this suit by the complainants.

LAMAR F. EASTERING,
LESTER C. FRANKLIN,
GEORGE E. SHAW,
CAMERON & WILLS,
Solicitors for Complainants,

(S.) By BEN F. CAMERON.

State of Mississippi,
County of Jasper.

Personally appeared before me, the undersigned Clerk of the Chancery Court of the First District of Jasper County, Mississippi, Lester C. Franklin, who makes affidavit that he is attorney of record for complainants and agent of complainants with authority to make this affidavit, and that the matters and things set forth in the foregoing document as of his own knowledge are true as therein stated, and those set forth on information and belief are set forth on information which he verily believes to be true.

(S.) LESTER C. FRANKLIN.

Sworn to and subscribed before me by the said Lester C. Franklin this 6th day of May, 1946.

(S.) J. J. DENSON,
Chancery Clerk.

* * * * * * *

(R. 856.) By the Court:

Complainants have filed an exception, or motion.

By Mr. Stevens:

We are looking at the motion; we would like to have time to read it.

By the Court:

All right; read the motion.

By Mr. Wills:

It is not a motion, it is an objection to proceeding in the case. Our sole purpose is to present this objection to Your Honor.

(Document read to the Court.)

By the Court:

Is it your contention that this Court is without full power to try the issue?

By Mr. Wills:

It is our contention when our motion was made to dismiss this Court was divested of jurisdiction. This objection is interposed to re-affirm that position, make clear to Your Honor what the purpose is.

By Mr. Stevens:

It is interpreted as a suggestion of error.

By Mr. Wills:

It is a written document and speaks for itself.

By the Court:

Anything else?

By Mr. Green:

On behalf of Gulf Refining Company we have in this (R. 857) original suit interposed a cross bill. We want to be perfectly fair and frank about this. We thought and still think that the exclusive jurisdiction to adjudicate this case is vested in this Court. We are ready so far as the Gulf Refining Company is concerned to go on with this case and have it determined.

By the Court:

Anything else?

By Mr. Stevens:

Unless the Court wants to ask some questions.

By Mr. Buchanan:

We take the same position, that this Court has concurrent jurisdiction, if not exclusive jurisdiction. We wish the Court to proceed with the trial of the case.

By Mr. Wells:

We think this Court has exclusive jurisdiction, and so far as the Tidewater Associated Oil Company, it is ready to go forward.

By Mr. Scott:

As to the defendants I represent in this case, we are ready and ask the Court to proceed with the trial of the case.

By Mr. Stevens:

On behalf of the Lewis family I want to make clear all these proceedings in the Federal Court were against our protest.

We think this Court has exclusive jurisdiction. It is a suit involving property rights, seeking to remove clouds and confirm title, adjudicate between owners their respective claims to this land or property. The venue is in this county, Jasper (R. 858) County.

So far as I know this case involves more property rights than any suit adjudicated by Your Honor, or anybody has adjudicated in the State. The issue should be put at rest by adjudication in this court.

We do not concede and have not conceded the Federal Court has any jurisdiction. Anything done in the Federal Court is void and should be held void in my humble judgment notwithstanding the ruling.

By Mr. Pack:

The defendant, Mrs. Mamie M. Abney, submits that this Court has exclusive jurisdiction, and further states that any and all actions, pleadings and proceedings by her in the Federal Court has been done in defense and express preservation of her rights; that this case should be litigated in this court.

By Mr. Wilbourn:

That is true of all defendants in each case in the Federal Court.

By Mr. Buchanan:

Yes. We still maintain the Federal Court has no jurisdiction.

By the Court:

I understand you all agree it is not necessary to enter any order on the allegations in the exceptions with reference to the threats, that this Court cannot protect its litigants and solicitors.

I will proceed with the trial of the case.

(R. 859.) By Mr. Wills:

Complainants are still standing on their objection and in doing so we beg leave to respectfully withdraw from the court room.

By the Court:

All right.

By Mr. Buchanan:

Before they withdraw I wish to say that we wish to put on our proof.

By the Court:

All right.

(Complainants' attorneys here withdrew from the court room, taking no further part in the trial of the case, whereupon Defendants offered and introduced the following: * * *

(R. 749-A) **FINAL DECREE.**

This cause coming on this day to be heard on original bill and amendments thereto, answers of all of the defendants thereto, and the cross-bill of Gulf Refining Company as against complainants as cross-defendants and the general demurrer of cross-defendants to said cross-bill, and proof, came the parties complainant by their attorneys and filed herein written objections to the jurisdiction of the court to try this case, but asked for no order to be entered thereon; and all the defendants announcing ready and demanding trial; and the Court being of the opinion that the court has jurisdiction to try this cause at this term, and there being no motion for or grounds for a continuance of the said cause, announced that the trial thereof should proceed;

Whereupon the attorneys for complainants announced to the Court that they would not proceed with or take part in any trial of the cause but would withdraw from the courtroom which they then and there did;

Thereupon the defendants offered evidence in open court to sustain their defenses to the original bill and amendments and evidence to sustain the allegations of the cross-bill of Gulf Refining Company; and the Court having heard and considered the pleadings, and the proof, doth now find, order, adjudge and decree from the pleadings and the competent proof as follows:

1.

That this Court has jurisdiction to adjudge and decree in the manner and form as it now does, and does not recog-

nize the right of complainants to withdraw as was wrongfully done, the Court (R. 749-B) reaffirming the Court's prior ruling refusing to allow a dismissal of said cause without prejudice by decree heretofore entered in said cause.

2.

That the complainants are not entitled to the relief prayed for nor to any relief and that the original bill and all amendments thereto be and they are hereby dismissed with prejudice.

3.

That the demurrer of complainants and cross-defendants to the cross-bill of Gulf Refining Company be and it is hereby overruled.

4.

That the Gulf Refining Company as cross-complainant is entitled to the relief prayed for in its cross-bill against complainants and cross-defendants and that the leases possessed by the Gulf Refining Company as listed in its original answer and cross-bill and recorded as follows, to-wit:

(1) Jettie Windham, G. R. Windham, Carrie Husband, and Norman Husband to Gulf Refining Company, recorded in Oil & Gas Record Book 2, at page 251, of the records of the Chancery Clerk of the First Judicial District of Jasper County, Mississippi.

(2) Margiree Jones and Abb Jones to Gulf Refining Company, recorded in Oil & Gas Record Book 2, at page 213, of the records of the Chancery Clerk of the First Judicial District of Jasper County, Mississippi.

(3) Mason Newell to Gulf Refining Company, recorded in Oil & Gas Record Book 6, at page 547, of the records of the Chancery Clerk of the First Judicial District of Jasper County, Mississippi.

(4) T. D. Lewis and Annie Lewis to Gulf Refining Company, recorded in Oil & Gas Record Book 2, at page 219, of the Chancery Clerk of the First Judicial District of Jasper County, Mississippi; and amendment thereto recorded in Oil & Gas Book 9, at page 341 of said records. (R. 749-C.)

are hereby adjudged and decreed to be good and valid; and that all claims of title, right or interest on the part of the complainants and cross-defendants and each of them in and to any or all of the lands covered by said leases are hereby canceled, annulled, and for naught held, and adjudged to be without foundation in fact or in law, and that the cross-complainant Gulf Refining Company is not due complainants and cross-defendants any royalty or royalties whatsoever.

5.

That no final record herein shall be made except that this decree shall be entered on the final record book and recorded as deeds are required to be recorded.

6.

That complainants and cross-defendants pay all costs herein to be taxed and that decree therefor is hereby entered against all such complainants and cross-defendants and the sureties on their bond for costs filed heretofore in this cause, for all of which execution may issue.

Ordered, adjudged and decreed in open court this the 6th day of May, 1946.

GEO. B. NEVILLE,
Chancellor.

* * * * * *

ASSIGNMENT OF ERRORS. No. 36,406.

(R. 145.) Come the Appellants, N. L. Hudson, Mrs. Exie Hudson, Philip L. Hudson, Mrs. Mary Lee Tillman, Mrs. Lessie Hudson Smith, Charles A. Hudson, Mrs. Mae Hudson Thompson, E. S. Blackmon, Graydon Blackmon, Mrs. Mae Hudson, Mrs. Ruby May Mitchell, through her uncle and next friend N. L. Hudson, Mrs. Grace Hudson Hyde, Mrs. Gertrude Hudson Ellison, being all of the complainants in the Court below, and assign the following errors of the Chancery Court of the First Judicial District of Jasper County, Mississippi, to-wit:

1. Said Court erred in overruling the Motion to Dismiss without Prejudice filed by complainants below (R. 605).

2. Said Court erred in entering its decree dated January 18, 1946, and recorded in Equity Minute Book 3, Page 197, of the records of said Court (R. 721).

3. The said Court erred in entering a final decree against complainants below, which decree is recorded in Deed Book No. 14, Pages 327-8, of the Land Records of Jasper County, Mississippi, and is dated May 6, 1946 (R. 749-A to 749-C).

4. Said Court erred in decreeing (R. 749-B) that complainants below did not have the right to dismiss their cause without prejudice.

5. Said Court erred in proceeding to a hearing and decree in said cause on May 6, 1946 (R. 749-A to 749-C, inclusive), said date not being a regular day of a regular or legal term of court in the First Judicial District of Jasper County, Mississippi.

6. Said Court was without jurisdiction to enter said decree at said time and place.

7. Said Court erred in declining to allow complainants below to dismiss their cause without prejudice, and in refusing to honor complainants' objection and in proceeding to a hearing in the absence of the complainants below and in hearing evidence and enterig a decree finding the facts and issues against complainants and dismissing their cause with prejudice.

8. Said cause was not triable at the time and place said final decree was attempted to be entered and the said Court erred in entering said final decree.

9. Said Court was advised that complainants, being non-residents of the State of Mississippi, had availed themselves of the rights given them by the Constitution and laws of the United States and had filed their actions in the United States District Court and that said District Court had overruled motions to dismiss and had taken jurisdiction of said actions and that same were being diligently prosecuted by complainants; and the Court below erred in refusing to honor the protest and objection filed by complainants (R. 725-49) and in refusing to recognize the jurisdiction of said United States District Court and in proceeding to hear evidence and enter its final decree against complainants.

In committing each and all of the errors complained of, as set forth in the record, said Court took action which amounts to and effects the taking of the property of appellants without due process of law and the denial to appellants of the equal protection of the laws in violation of the Constitution and laws of the United States and the Constitution and laws of the State of Mississippi.

Wherefore, appellants pray that the action and decrees of the Court below may be reversed, and that a decree may be entered by this Honorable Court dismissing the suit without prejudice; and that such other and further relief may be granted to appellants as will do full and general justice to them in the premises.

OPINION OF SUPREME COURT OF MISSISSIPPI.
(R. 454)

DIVISION B.

L. A. SMITH, SR., J.:

Thirteen heirs of N. L. Hudson, Sr., claiming to be the sole and only owners in fee of the 360 acres of land described, as well as of all the mineral interests therein, filed their bill in the Chancery Court of Jasper County against 106 defendants, including the Gulf Refining Company (which, under a mineral lease from certain of its co-defendants, had developed and was developing its holdings into an actual oil-producing acreage), and against other defendants, who, in addition to Gulf Refining Company, claim under other mineral leases covering in the aggregate all of the lands in question.

The claim of the said Hudson heirs is that during the year 1878 or 1879, N. L. Hudson, Sr., the then owner of the land, had conveyed all of it to his wife, M. E. Hudson, for the term of her natural life, and at her death to the children of said N. L. Hudson, Sr., for life, the remainder in fee to their children; that the deed was duly recorded, but the record thereof was destroyed by the courthouse fire in September 1932; and that complainants have not been able to find the original deed for recordation. It was further averred that N. L. Hudson, Sr., died in 1895, and M. E. Hudson, in 1928, and that subsequently to the date of the deed conveying a life estate to her, M. E. Hudson had executed deeds of conveyances to various grantees as if she owned the title to fee simple. Complainants, ap-

pellants here, also charged that by these conveyances the 106 defendants were, as latest grantees or their heirs, the present adverse claimants; and that by reason of the facts, *supra*, appellees had become and remain since the death of M. E. Hudson, the tenants at sufferance of the complainant heirs.

Nearly all of the numerous defendants answered, and Gulf Refining Company and some twenty-five other defendants made their answers cross-bills. The answers denied that Hudson had made any such deed to his wife in 1878 or 1879, or at any other time in any such terms as asserted by complainants. On the contrary, they averred that, in fact, Hudson had made to his wife, M. E. Hudson, on January 23, 1880, a deed to the lands in fee simple absolute, this deed being recorded in Book 20, p. 135 of the records of deeds of the county. The defendants, appellees here, averred also that by unbroken chains of title from M. E. Hudson to them, as well as by more than forty years of adverse possession, they have become the owners, and that the complainants never in fact owned any interest whatever in the lands.

The answer by Gulf Refining Company, in addition to elaborate denials and averments touching the title by executed conveyances, adequately alleged adverse possession in its predecessors in title for the long period of years aforesaid. Making its answer a cross-bill, it prayed that its mineral lease be confirmed as against the original complainants, and prayed for alternative as well as for general relief. The twenty-five other defendants who made their answers cross-bills, in addition to setting up their

particular interest in the premises, adopted all the denials and averments of the answer of the Gulf Refining Company and likewise, and as stated, made their answers cross-bills. The answer and cross-bill of Gulf Refining Company was filed on September 16, 1944, and those of the other twenty-five cross-complainants on September 30, 1944. On December 12, 1945, the complainants filed a motion to dismiss their original bill aforesaid without prejudice, which motion was actively resisted by numerous of the original defendants, and the motion was overruled.

Had there been no cross-bills, it may have been that the complainants would have had the right to dismiss, as they sought to do, but leaving that question aside for the moment, we are of the opinion that they had no right to do so and at the same time secure the dismissals of the cross-bills, unless by the consent, express or implied, of the cross-complainants.

In days gone by it was the general rule that the dismissal of the original bill carried with it the cross-bill, but the modern rule, and particularly in this State, is as stated in Griffith Miss. Chancery Practice, Section 384, which reads as follows:

> "The strict theory of the cross-bill is that it is a dependent of the original bill, in consequence of which formerly it was generally held that a dismissal of the original bill carried with it the cross-bill, but this rule too has been departed from so that now if the cross-bill seeks affirmative relief separately and independently of the original bill—although, of course, growing out of or touching the same subject matter

involved in the original bill, as it must—the court will at the insistence of the cross-complainants retain it and proceed with its issues, if the cross-bill and its facts be complete enough within themselves and without the aid of the original bill to make the granting of relief thereon practicable and proper. It is at last a matter within the sound discretion of the court to be wisely exercised towards the advancement of justice between the parties. And not only will the court retain the cross-bill in every case where if the matter had been brought in an original bill it would have retained it, but it should be kept in mind that the advancement of our procedure has developed a definite disfavor towards any practice which tends to turn parties out of court when once they were fairly in, and of sending them away either to transform the pleadings or else to begin the matter over again. Therefore, it is only when the matter of the cross-bill, independently considered, is so clearly of law as to be distinctly a better subject of determination at law, that a cross-bill will be dismissed, or transferred, merely because the original bill has been dismissed."

This statement is in accord with the weight of authority elsewhere, as may be found in 30 C. J. S., Equity, Sec. 388, pp. 804-806.

Thus it is seen that the cross-bill will be retained where, if the matter therein had been brought in an original bill, it would have been retained, and that in such case it is only when the matters of the cross-bill, independently considered, are so clearly of law as to be distinctly a better subject of determination at law, that a cross-bill will be dismissed merely because the original bill has been dis-

missed. In other words, where the relief sought by the cross-bill is a matter cognizable at law, dismissal of the original bill carries with it, generally, the cross-bill, and the cross complainant is relegated to his remedy at law. But here the prayer of the cross-bills sought confirmation of title to land, and hence was equitable, as pointed out further in the succeeding paragraph.

Here, the cross-bills bring forward, with elaboration, the issue of adverse possession, and rely thereon in addition to the title by conveyances, a feature in respect to which no substantial aid is furnished by the original bill, and as to Gulf Refining Company it prays that its title be confirmed in it as against all the original complainants. This right to have an affirmative adjudication in chancery of title to real estate is one conferred by statute, supplementary to the ancient rules in equity on that subject. It is not so clearly of law as to be distinctly a better subject of determination at law, the fact being that, at this day in this State, land-title questions are almost always presented in the chancery court, the action of ejectment having become nearly obsolete in actual practice, and certainly so in cases involving parties as numerous as in the instant case.

It is said, however, that as to Gulf Refining Company, the latter filed no objections to the motion to dismiss and thus did not insist that its cross-bill be retained, to which Gulf Refining Company replies, citing Griffith Chan. Prac., Sec. 407, that no formal objection or response to such a motion was required, and the burden of proof to support it was on the movant; and further that the record shows

that Gulf Refining Company, by its attorney, was present and participated in the hearing wherein the motion to dismiss was resisted.

We are of the opinion, therefore, that the court was correct in not dismissing the cross-bills, and in proceeding to a final hearing on them, without the attendance of cross-defendants, who purposely absented themselves; and, further, that upon the record the court was correct in sustaining the cross-bills on the merits.

This brings us back to the original bill—whether it should have been dismissed, retaining the cross-bills. This, as it seems to us, has now become, as to all practical purposes, a moot question. Under the cross-bills every issue and question, which could have been determined under the original bill, were adjudicated against the original complainants and cross-defendants in favor of cross-complainants and their privies. Thereby the whole matter has now become *res adjudicata*. *Van Zandt v. Town of Braxton*, 149 Miss. 461, 465, 115 So. 557; *Watkins v. State Board*, 170 Miss. 26, 32, 154 So. 277. 'Upon similar principles see also Griffith's Chan. Pract., Secs. 263, 363, 571, 624.

In view of the foregoing announcement of our conclusion here, which completely determines the ultimate solution of the problem on the appeal before us, we do not deem it necessary to discuss other points, on both sides, ably argued in the several briefs filed.

The decree of the Chancery Court will, therefore, be and is affirmed.

AFFIRMED.

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 262

N. L. HUDSON, ET AL.,

Petitioners,

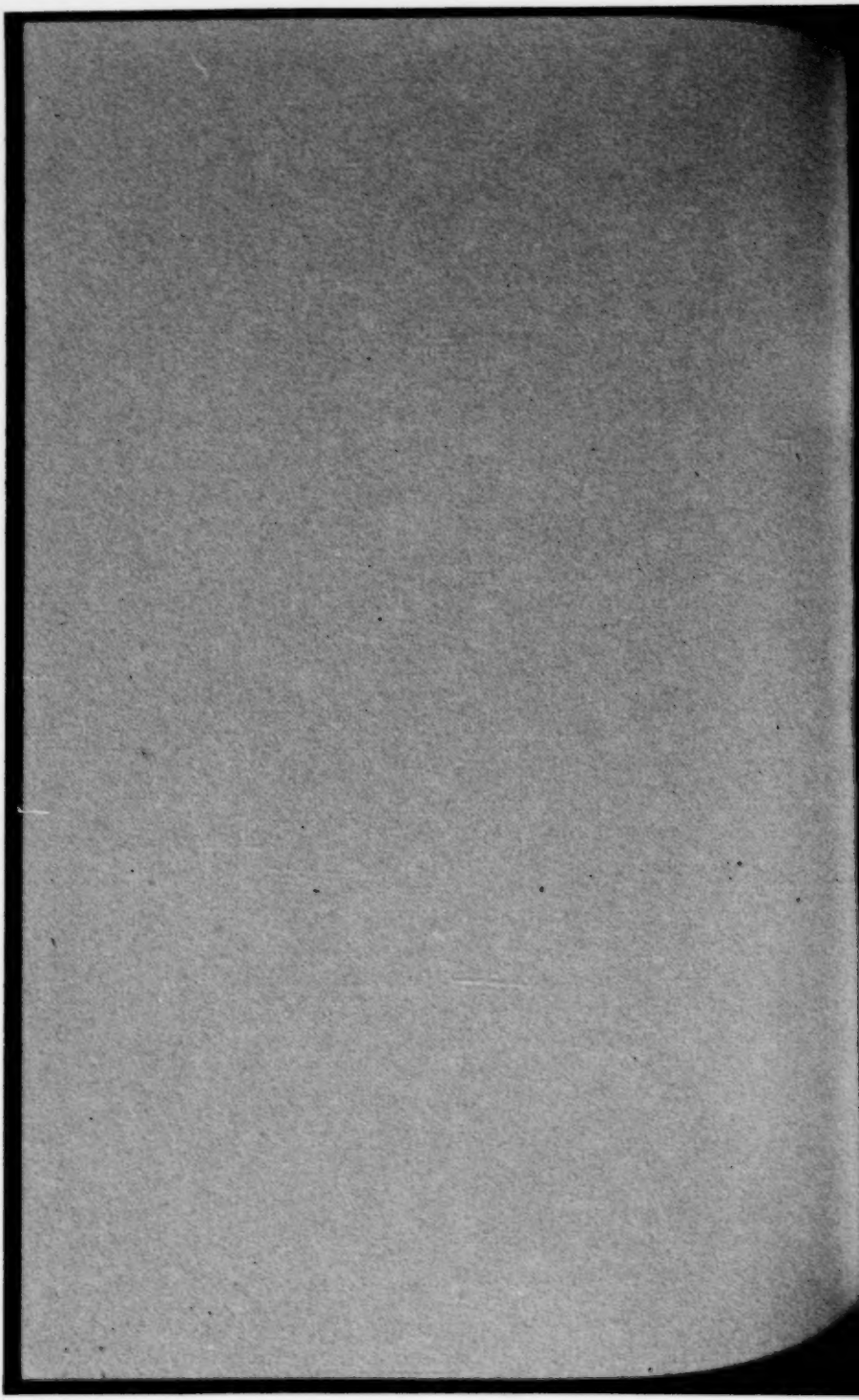
versus

GULF REFINING COMPANY, ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONERS.

LAMAR F. EASTERLING,
GEORGE E. SHAW,
LESTER C. FRANKLIN,
ROBERT E. PERRY,
LESTER E. WILLS,
BEN F. CAMERON,
Solicitors for Petitioners.



SUBJECT INDEX.

PAGE

PART I. BRIEF ON MOTION TO DISPENSE WITH RECORD 1

Should the Petition be Dismissed because of the Absence of Indispensable Parties? 2

Respondents Make No Adequate Answer to Petitioners' Motion to Dispense with Printing Record 2

PART II. REPLY OF PETITIONERS TO RESPONDENTS' BRIEFS OPPOSING GRANTING OF THE WRIT OF CERTIORARI 6

I.—In Overruling Petitioners' Motion to Dismiss Without Prejudice 7

II.—In Denying Interlocutory Appeals and Forcing Petitioners to Go to Trial Under Threats and Armed Guards When Petitioners Were Insisting On Their Constitutional Rights and Their Right to Pursue Their Federal Actions 10

III.—In Proceeding to Judgment Against Petitioners on Ex Parte Hearing at a Time When the Case was Not Triable Because of the Absence of Necessary Parties 16

IV.—In Proceeding to a "Trial on The Merits" and Approving Decree on Cross-Bill Alone When Mississippi Practice Permitted Only Dismissal With Prejudice 22

V.—In Awarding Judgment Against Petitioners on the Cross-Bill of the Ridgways 24

VI.—In Proceeding to Judgment on Gulf's Cross-Bill without Giving Petitioners the Opportunity to Answer and Defend it After the Demurrer to the Cross-Bill was Overruled and When Petitioners Had Settled With Gulf 28

SUBJECT INDEX—(Continued)

PAGE

PART II—(Continued):

VII.—In Awarding Judgment Against Petitioners and in Favor of Gulf in a Case Not Justiciable Because It Had Become Moot ... 31

VIII.—In Awarding Judgment Against Petitioners on Cross-Bills Showing No Right to Relief After Original Bill Has Been Dismissed and to Which a Demurrer Had Been Interposed 32

IX.—By the Decision of the Supreme Court of Mississippi on a Point Never Presented to or Passed on By The Lower Court and Which Petitioners Never Had a Chance to Defend 33

X.—By the Holding of the Supreme Court of Mississippi that the Judgment in a Case Between Petitioners and Gulf is Res Judicata as Between Petitioners and the Lewises, et al., Not Parties to the Cross-Bills 34

CONCLUSION 35

CASES CITED.

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231 31

Angel v. Bullington, L. Ed. Advance Opinions March 10, 1947, Page 557 37

Chase National Bank v. Norwalk, 291 U. S. 431, 78 L. Ed. 894 35

Davis v. Wechsler, 263 U. S. 22, 68 L. Ed. 143 34

Hartford, etc. v. Bunn, 285 U. S. 169, 76 L. Ed. 685 2

Majure v. Johnson, 192 Miss. 810, 7 So. (2d) 545 ...26, 33

CASES CITED—(Continued)

	PAGE
Mississippi, etc. Co. v. Brookhaven, etc. Co., 165 Miss. 820, 147 So. 814	26
New York Ins. Co. v. Bangs, 103 U. S. 435, 26 L. Ed. 580	22
Paepcke Leicht, etc. Co. v. Savage, 137 Miss. 11, 101 So. 709	16
Parker v. Smith, et al., 150 Miss. 849, 117 So. 249	22
Thomasson, et al. v. Kinard (Miss. Sup. Ct. 1929) 153 Miss. 398, 121 So. 109	9
Williams v. Patterson, 178 Miss. 120, 21 So. (2d) 477	10
Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220	37

AUTHORITIES CITED.

43 Corpus Juris Secundum, p. 318	22
Mississippi Code of 1942, Section 1301	26
Rule 22 of Sup. Court of Mississippi	26
Rules of Supreme Court of United States, Rule 48	2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 262.

N. L. HUDSON, ET AL.,

Petitioners,

versus

GULF REFINING COMPANY, ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONERS.

PART I.

BRIEF ON MOTION TO DISPENSE WITH PRINTING RECORD.

Respondents, Gulf Refining Company and the Ridgway group, have filed an unnamed document which we interpret to be an opposition to this Court's proceeding with the Petition for Certiorari without printing the record. This document will be so treated, and a brief reply thereto made on the assumption, although the major portion of it seeks to deal with the merits.

Should the Petition Be Dismissed Because of the Absence of Indispensable Parties?

The first point made by Gulf is that the sureties on the cost bond from the Chancery Court to the Supreme Court of Mississippi did not join in the Petition for Certiorari, and the point is made that since the judgment has become final, Certiorari should not be granted because of the absence of these sureties. Gulf relies on the case of *Hartford, etc. v. Bunn,* 285 U. S. 169, 76 L. Ed. 685. Perhaps we would not stop to mention this point if it was not reiterated and dwelt upon by Gulf at the conclusion of its main brief (Brief P. 75). The line of cases, of which that is an example, and this entire argument, so confidently submitted, falls before the new rule of this Court (Rule 48), which completely disposes of such a contention:

> "Parties interested jointly, severally, or otherwise in a judgment may join in an appeal or a petition for writ of certiorari therefrom; or, without summons and severance, any one or more of them may appeal or petition separately or any two or more of them may join in an appeal or petition."

Respondents Make No Adequate Answer to Petitioners' Motion to Dispense With Printing Record.

Petitioners set forth in their Motion to Dispense With Printing of The Record, supported by proper affidavit: (1) That Petitioners had been forced to stand the expense of a record of more than Fourteen Hundred pages to the Supreme Court of Mississippi because of the un-

reasonable failure of Respondents to agree on a shortening of the record; (2) that Petitioners had made an earnest effort to agree to shortening the record here, but Respondents would not so agree unless unnecessary portions of the record were included, and unless matter were included which was not in the record below; (3) that Petitioners were not financially able to print the record and would have to abandon their Petition if forced to do so; and, (4) that we had printed an Appendix which was a reasonably adequate record for this Court to pass on the Petition. Respondents have not denied any of those facts by any proper showing by affidavit or otherwise.

(1) There is no dispute whatever of the averments in the motion that Petitioners had been put to enormous unnecessary expense already. A record of one to two hundred pages would have been adequate to present all questions to the Supreme Court of Mississippi. The enormous record of Fourteen Hundred pages was made necessary, according to the averments of the Motion which stand undisputed, because Respondents would not enter into an agreement concerning the record there.

(2) It is established that Petitioners made an earnest and reasonable effort to stipulate to shorten the record to this Court. Paragraph 5 of the Motion, duly sworn to, sets that forth and there is no proper denial of it. Respondents seek to set forth, on pages 15 to 29 of their Response to the Motion, certain correspondence purporting to have passed between the attorneys. That correspon-

dence is not in the record and is not properly proved and, at all events, does not purport to present all of the negotiations. Assuming, however, that it is properly before the Court, these conclusions abundantly appear from the sworn Motion and these exhibits:

(a) That Petitioners went "the second mile" and offered to include far more than was necessary in the record to be printed. (Respondents' Opposition Pages 15, et seq.)

(b) That Respondents sought to exact the inclusion in the printed record of matters not in the record before the Supreme Court of Mississippi. See, for example, the statement at the top of page 22 of Respondents' Objection: "Travis, Finch and McFarland are . . . the sole persons who as attorneys were acquainted with these records who are presently alive and available"; and the statement on the following page: "There were no armed deputies present, there was no searching of any person for weapon . . .". Another example of the same thing is found on page 26 of Gulf's Objection, where Mr. Buchanan demanded inclusion of the following statement:

> "That the defendants, Paul Ellis Newell and Claudies Newell . . . appeared at the January, 1946 Term of court in said cause, by their attorneys, and announced ready for trial . . .".

There was no evidence whatever in the record to sustain any of this.

(c) From page 21 of Gulf's Objection it appears that Gulf attempted to exact an agreement from Petitioners concerning several hundred pages of a so-called trial on the merits (which agreement Petitioners could not, under any circumstances, make) concerning a matter not involved at all in the points raised by Petitioner.

(3) It is undisputed that Petitioners are not able to print the record and will have to abandon their Petition if required to print it—see Page 12 of Gulf's Objection, where it is stated:

> "Under these facts, with deference, we submit that the full record should be printed so as that the factual background could be made clear . . .".

There are some vague references to amounts paid Petitioners in settlements nearly three years ago, but it is undisputed that they cannot now finance the printing of this enormous record.

(4) There is no serious contention that the Appendix printed by Petitioners is not adequate for the presentation of all questions raised by the Petition to this Honorable Court. The copious references made by Respondents to this printed Appendix demonstrates that it contains what is necessary to pass on the Petition. It is also freely admitted by Respondents that typewritten copies of the entire record were available to them, and, of course, the entire record is filed in this Court in typewritten form.

This adequacy of Petitioners' printed Appendix is further demonstrated by the Appendix Gulf printed with its brief. It was to be presumed that Gulf, if it printed any Appendix at all, would include such additional parts of the record as it deemed essential to decision on the Petition. Yet, examination of its printed Appendices will show that Gulf devoted pages 77-99 to its Appendices B, C, D and E, which were but repetitions of what Petitioners had already printed and the last twenty-five pages (99-123) to Appendix F attempted to get before this Court a portion of the Federal Court proceedings not in this record at all. Gulf, therefore, added to Petitioners' Appendix printed as a substitute for the record only one-half page (p77).

Moreover, now that the Respondents have fully briefed the question of the granting of the Writ, and no substantial dispute has developed concerning what the record shows (except, of course, in those instances where Respondents have admittedly gone outside the typewritten record), it is respectfully submitted that the whole question is now fairly before the Court and can be considered without any hardship either to the Court or to Respondents.

PART II.

REPLY OF PETITIONERS TO RESPONDENTS' BRIEFS OPPOSING GRANTING OF THE WRIT OF CERTIORARI.

Two briefs have been filed by Respondents in opposition to the granting of the Writ, one by J. Morgan Stevens,

Esq., et al, on behalf of Respondents Lewis, et al, which will be referred to as the Lewis Brief; and the other by Garner W. Green, Esq., et al, on behalf of Gulf Refining Company, et al (it not being revealed who the others are), which will be referred to as the Gulf Brief. The ten points relied on by Petitioners in our original brief will be followed in an effort to show that Respondents have failed to furnish any adequate answer to those points.

It is conceded by Respondents that the State Court was under duty to enforce rights claimed by Petitioners under the Constitution of the United States, and that this Court has the final say where a claim is based on the denial of constitutional rights. It is not necessary, therefore, to submit further argument in support of Parts A (Pet. Brief, Page 40) and B (Pet. Brief, Page 42), and this reply is confined to Part C (Pet. Brief, Page 44), setting forth the details of the actions taken by the Mississippi Courts which amounted to denial of Petitioners' constitutional rights.

I.

In Overruling Petitioners' Motion to Dismiss Without Prejudice.

It abundantly appears (Petitioners' Brief, Pages 44, et seq.) that by statute a complaint in an equity case has a right to dismiss his suit and that "the privilege continues up to the time when the cause has been submitted to the chancellor for final decision upon the merits of the

case." In every Mississippi case cited by any litigant that right is held to be absolute, provided only the defendants have not acquired superior rights by what has transpired in the case. The chancellor evidently felt that the defendants had acquired superior rights, and the Lewis Brief seeks to sustain the chancellor's view. The Supreme Court of Mississippi, however, did not sustain the chancellor's view, but assumed that right to dismiss to exist. Gulf (Br. Pages 23-45) does not contend that the defendants had acquired any rights which would interfere with dismissal. It is reiterated therefore with confidence that the series of actions taken by the State Courts started out with a clear error by the chancellor in refusing to permit Petitioners to dismiss their suit. Petitioners had the right to invoke the jurisdiction of the Mississippi Chancery Court, and under the circumstances existing in this case,—there being no superior rights acquired by defendants—had a right to end that jurisdiction at will.

Gulf's argument deals with a wide variety of subjects (Gulf Br. Pages 25-45), but does not advance any valid contention to support the theory that Petitioners did not have the absolute right to dismiss. It insists, for instance, that Petitioners ought not to complain because they walked off and left the court below. It is clear from the whole argument that Petitioners had to refuse to proceed further or waive their absolute right to dismiss.

As was to be expected, Gulf essays (Gulf Br. P. 42, et seq.) to deal at some length with the fancied merits of

the case. They do this despite the fact that the same Brief (P. 76) concludes with the statement: "The points made by us relate to procedure alone ..... ". Gulf's Brief goes so far as to set forth, on Page 77 of its appendix, some sort of abstract of a supposed conveyance although no record reference of the supposed conveyance is made. Gulf's desperate efforts to deny Petitioners a chance to introduce their evidence on the merits rather tends to contradict the repeated lugging in of snatches of the so-called hearing on the merits. This confession of weakness on the part of Respondents is manifestly born of the knowledge that when Petitioners do get to the point where they can put in their evidence they will bring themselves squarely within the decisions of the Supreme Court of Mississippi, in one of which—*Thomasson, et al v. Kinard* (Miss. Sup. Ct. 1929), 153 Miss. 398, 121 So. 109—that court was dealing with a situation identically like this one, even to the number of years elapsing before the bringing of the suit. There, as here, it was contended that title had been acquired by adverse possession, and the Supreme Court of Mississippi repudiated the claim entirely because those claiming to hold by adverse possession were tenants at sufferance. Here is some of its language:

> "In our opinion it is firmly fixed by the decisions of our court, and a settled rule of law, that the grantee of a life tenant holding over after the death of said life tenant becomes tenant at sufferance of the heirs at law, the remaindermen . . .
>
> "May the tenant at sufferance set up a hostile claim of adverse possession based simply upon possession?

> We answer this question in the negative, though the authorities elsewhere are not in agreement with the past decisions of our court. . . .
>
> "A grantee of a life tenant, holding by virtue of a fee simple deed from the life tenant, and at the termination of the life estate continuing to hold over the lands conveyed, does not hold adversely to the life tenant."

See also *Williams v. Patterson*, 178 Miss. 120, 21 So. (2d) 477.

II.

In Denying Interlocutory Appeals and Forcing Petitioners to Go to Trial Under Threats and Armed Guards When Petitioners Were Insisting on Their Constitutional Rights and Their Right to Pursue Their Federal Actions.

At pages 49-56 of our original Brief we placed before this Court the peculiar position in which Petitioners were placed because of the requirement of Mississippi practice that we decline to proceed further if we would rely upon our dismissal without prejudice. It was contended that that very situation called for generous treatment by the Mississippi Courts in the granting of interlocutory appeal. Our opponents do not attempt any answer to that contention. In attempting to respond to our argument concerning the tense atmosphere of the chancery court of Jasper County, Mississippi, Respondents have, as anticipated, sought to predicate their answer on matters wholly outside the record. Petitioners' argument was based

entirely on the chancellor's letter taking cognizance of the threats, which letter Petitioners made a part of the record before the chancellor (R. 730, Appendix 63), and the reasonable inference to be drawn from that letter. We might have pressed the point further and have quoted from an admission made by one of the attorneys for Respondents in the Supreme Court of Mississippi, which admission appears on Page 1324 of the record on file in this Honorable Court. The attorney representing quite a few of the litigants, trying to explain the threats, had this to say:

> ". . . grew out of the natural resentment following attempts of agents of appellants to question the witnesses for the defendants. The Court can easily visualize the natural resentment following tactics on the part of appellants in trying to force defendants' witnesses to disclose information which they did not wish to disclose out of loyalty to the defendants."

We did not advert to this admission because we preferred to cast this portion of the argument entirely upon the chancellor's letter, which recognized the existence of the threats, and which was in the record.

Respondents have made no attempt to answer our argument within the confines of the record, but have, without apology, sought to go entirely without its bounds in an effort to discredit the argument concerning threats, or more accurately, the author of the arguments. In the Lewis Brief (Pages 19 and 20) the effort is made confessedly to bring in outside matter, and Gulf goes so far as to append, as Appendix F to its Brief (Pages 99-123), a

supposed transcript of what transpired in one phase of the hearing of the cases in the Federal Court. None of that was in the record in the Chancery Court of Jasper County or the Supreme Court of Mississippi and is not in the record certified by the Clerk of the Supreme Court of Mississippi and filed in this Court. Such unwarranted efforts to bolster the case of Respondents can be considered as nothing but a confession of weakness on their part.

Both of the briefs of Respondents argue at length that Petitioners' arguments concerning threats should be discounted because the threats were not mentioned by these attorneys when they were being questioned by Respondents in the Federal Court proceedings. The unfairness of such an argument is palpable when it is considered that Messrs. Cameron and Easterling were being examined by Respondents in the Federal Court proceedings only concerning one narrow issue pending in that court. From that Respondents seek to argue now that the threats were nonexistent because Petitioners' attorneys did not mention them in their testimony given on an unrelated matter.

This shameless excursion out of the record in this case would justify Petitioners in making whatever statement they might desire concerning these threats, but Petitioners specifically decline to engage in such an unauthorized proceeding. It is sufficient to say that the entire argument concerning threats, which is set forth in Petitioners' Brief bears the subscription of the same

attorney, a member of the Bar of this Court. Those arguments are not discredited in the slightest degree by anything contained in the briefs of Respondents or their illegitimate appendix.

We advanced (Pet. Br. Page 55) the argument that the learned chancellor was led into the error of refusing to permit Petitioners to dismiss without prejudice by the statements made by all of Respondents' attorneys (Appendix Page 74) that the State Court had exclusive jurisdiction. It is interesting to note that Judge Stevens, in his brief, stands by the position taken by him before the chancellor (Appendix 74):

> "We think this Court has exclusive jurisdiction. It is a suit involving property rights, seeking to remove clouds and confirm title, adjudicate between owners their respective claims to this land or property. The venue is in this county, Jasper County.
>
> "So far as I know this case involves more property rights than any suit adjudicated by your Honor, or anybody else has adjudicated in the State. The issues should be put at rest by adjudication in this court.
>
> "We do not concede and have not conceded the Federal Court has any jurisdiction. Anything done in the Federal Court is void and should be held void in my humble judgment notwithstanding the ruling."

Beginning on Page 32 of the Lewis Brief this point is argued at great length under the heading, "The Federal Court Had No Jurisdiction Because of the Pendency of this State Court Action". Judge Stevens there argues

for ten pages that there was no concurrent jurisdiction in the Federal Court and that the State Court had exclusive jurisdiction. As heretofore stated, every single attorney representing the defendants before Chancellor Neville urged that same view, and doubtless led the chancellor into error which lies at the base of all Petitioners' contentions.

But Gulf repudiates that position in its Brief before this Court. It concedes that the State Court and the Federal Court had concurrent jurisdiction—which is, of course, correct, except that Petitioners' dismissal of the State Court suit had divested that court of jurisdiction. Here is Gulf's position, as stated on Page 49 of its Brief:

> "That sought was not so **in rem** as to make the jurisdiction of either the State Court or the Federal Court exclusive of the other, but that these two suits could so operate, one in one court, the other in the other court, as that both in due course could be brought to final judgment . . ."

If Gulf had made that concession before the chancellor instead of contending (Appendix 73) that the Chancery Court had exclusive jurisdiction, perhaps the chancellor would not have been led into this fundamental error.

In arguing this point Respondents seek to take another wide excursion from the record in this case in an effort to bring before this Court the wholly unrelated contention that the United States District Court in Mississippi does not have jurisdiction of those suits because of the supposed absence of indispensable parties. The Lewis

Brief sets forth that argument at Page 33, and Gulf dwells at length on it on Pages 48 and 49, and by attempting to include, on Pages 99 et seq., the supposed excerpt from testimony taken in the United States District Court. This Court will understand that not one single fact adverted to on Page 48 of Gulf's Brief is sustained by the record, and that this entire Appendix F is wholly *dehors* this record. They even go so far as to advise this Court that the United States District Court in Mississippi is going to hear re-argument on the Motion to Dismiss.

This determined refusal to present to this Court argument based on the record is, we submit, a confession that Respondents cannot find in the record an answer to Petitioners' arguments. We respectfully decline to be drawn into a discussion based entirely on some fancied situation which this record does not disclose.

This record does disclose (R. 734) that the United States District Judge did, on March 15, 1946, enter its order overruling all motions to dismiss and abate the Federal Court actions, and this record does contain the findings of fact and conclusions of law of the Federal Court (R. 746-8), all of which were before the chancellor when he rendered his decision, from which conclusions the following is quoted:

> "That the Court has jurisdiction of the subject matter and of the parties, . . . that no indispensable parties are absent; that there is no legal impediment in the way of proceeding with the trial of said actions; and that the motions and supplemental motions of the defendants to dismiss, stay or abate the re-

spective counts of said actions, and each of them should be overruled . . .".

III.

In Proceeding to Judgment Against Petitioners on Ex Parte Hearing at a Time When the Case Was Not Triable Because of the Absence of Necessary Parties.

We made the point, on Page 56 of our Brief, that Claudies Newell and Paul Ellis Newell were necessary parties defendant, and neither of Respondents' Briefs denies this. Neither denies that the rule in Mississippi is, as quoted on Page 57 of our Brief from the Mississippi cases there cited and as announced within the last year or two:

> ". . . the Court will not proceed to a final decree as to any defendant until the cause is triable as to all the defendants . . .
>
> "Where there are several defendants, the cause is not ready for trial as to one, until ready as to all of the defendants."

There is no merit in the contention that the Newells are the only ones who could make that point. In *Paepcke Leicht, etc. Co. v. Savage,* 137 Miss. 11, 101 So. 709, the Mississippi Supreme Court was dealing with a suit to quiet title just as it was dealing with such a suit in the case before the Court. That court held there that a decree rendered without service on the parties required under the statutes relating to suits to quiet title was void and

subject to collateral attack, this being the seventh syllabus of that decision:

> "A decree which is void because of no service of process upon proper defendants may be attacked either directly or collaterally."

In *Dorsey v. Sullivan,* quoted from *supra,* the Mississippi Court reiterated the rule as late as February, 1946. That, too, was a suit to quiet title brought under the same statutes as the present case. There one Sullivan filed his bill against Cammie Dorsey and others to quiet title to real estate. Process was properly served on Cammie Dorsey, but the attempted process on other parties was invalid. Cammie Dorsey and two other defendants appealed, making the point that when the case was tried and final judgment rendered, it was not triable because defendants other than themselves were not validly served with process. The whole decision deals with the necessity of having all parties in court, and the Supreme Court of Mississippi reversed and remanded the case because parties other than those appealing had not been served with process, and the fifth syllabus epitomizes its holding thus:

> "A court of equity will not proceed to a final decree as to any defendant until the cause is triable as to all the defendants."

The sixth syllabus further summarizes the rule in Mississippi as announced in this, the last, decision of the Mississippi Court:

> "A final decree which was entered against a named defendant when other defendants were never in court

. . . would be reversed and remanded pursuant to the appeal of certain of the defendants."

The case is so clearly determinative of this point that we set forth here certain language used by the Mississippi Court at separated points in the opinion:

> "No process was ever served on some of the defendants, and the process on others was defective * * *. However, process was validly served on some others of the defendants. * * *
>
> "When final decree was entered in this case, the record was not in condition to justify it * * *.
>
> "On the same day decree pro confesso was rendered against Cammie Dorsey, Will Dorsey, and Wiley Dorsey, the appellants and others * * *. On the same day that the decree pro confesso was entered, what is termed in the record as a final decree thereon was entered against the same defendants therein * * *. It will be recalled that not all of the defendants were ever in court by any known valid form of process * * * before this final decree was entered. * * *
>
> "Where there are several defendants, the cause is not ready for trial as to one, until ready as to all of the defendants. * * *"

In that case, therefore,—cited in our original Brief (Page 57) and not differentiated at all, the Mississippi Court, dealing with precisely the same situation as confronted it in the present case, reversed where decree *pro confesso* and final decree was entered, and reversed even though the parties appealing were served with process and were properly in court. That case would

have required that this case be reversed. We so contended in our original brief and no respondent has sought to challenge that position or to question our interpretation of the effect of these holdings of the Mississippi Court.

Gulf attempts to answer this by claiming (Gulf Br. 53) that this was purely a State question and that since we voluntarily withdrew from the court we cannot take advantage of it. Here indeed is a novel contention! Admittedly the case was not a triable case when the Chancery Court of Jasper County sought to try it and enter a final judgment at the special May Term. Petitioners knew when they declined to proceed further, that they could not try the case and Respondents could not try the case. The case was no more triable than it would have been if process had never been served on any of the parties. When Petitioners declined to proceed further they were entitled to rely on the situation which existed when they entered their declination. Their rights were fixed as of that moment. If the case was not triable Petitioners had a right to decline to go to court or to have anything to do with the proceedings.

Is it possible that Respondents contend that a judgment of the Mississippi Courts is based on due process of law and equal protection of the laws, when the judgment was rendered in a case admittedly not triable, and when that judgment is to be placed in the hands of Respondent as a weapon to be used in the pending Federal Court cases? So to contend would be to fly in the teeth of what this

Court has been saying throughout its existence.—See cases cited in our original brief.

The Newells themselves do not make such a contention as that—see Lewis Brief Page 46. Nor do they contend that there is any inaccuracy in Petitioners' statement of the facts concerning the state of the record as it related to them. A brief review of that record is important in answering the Newell contention.

The record in this Court shows no service of process on either Claudies or Paul Ellis Newell. Respondents do not attempt to point out any such service. Their guardian (R. 119, Appendix 15) filed a motion to stay proceedings, in which it was set forth:

> "* * * Claudies Newell and Paul Ellis Newell are now in the military service of the United States of America and that said wards have not been legally served with process * * * and that the rights of the said Claudies Newell and Paul Ellis Newell will be prejudiced by the trial of this cause without their presence."

The Lewis Brief contends (Page 46) that Mason Newell, as guardian, filed an answer on behalf of these two minors. Here is what that answer says (R. 202, Appendix 16):

> "Defendants would show unto the Court that the wards of the defendant guardian, namely Claudies Newell and Paul Ellis Newell, are both in the military service of the United States of America serving outside of the continental limits of the United

> States of America and that said wards have not been personally or legally served with process in this cause, * * * and that this answer is not intended to waive any rights on the part of the said two wards of said guardian, but all rights which they are entitled to assert in this cause on their behalf are prayed to be reserved unto said minors and to be retained by them * * *."

The Lewis Brief (ib.) goes so far as to contend that these two minors were represented by their attorney, J. R. Buchanan, "who appeared at the January, 1946, Term of court and insisted upon a trial of the cause * * *". Now the record does not show any such fact as that. The insistence on the part of this attorney that this statement be included in the record (Gulf's Opposition to Motion to Dispense with Printing Record Page 26) was one of the reasons why the litigants could not agree on the part of the record to be printed.

But even assuming that this was true, it is certain that the solicitor for these minors could not appear for them or waive their right to be served. That is the law in Mississippi:

> "An infant can waive none of his rights, and no jurisdiction can be had over person of infant, except by issuance and service of process in manner required by Code 1906, Paragraph 3929.
>
> "If infant is not legally served with process as provided by Code 1906, 3929, appearance of his solicitor though employed by him will not bind infant."

(See first and second syllabi of decision of Supreme Court of Mississippi in 1928 in *Parker v. Smith, et al,* 150 Miss. 849, 117 So. 249.)

The general law on the subject is stated in *43 Corpus Juris Secundum,* Page 318: "An infant cannot waive personal service of process; nor can any other person do so for him;" and this Court certainly has put the subject at rest—see second syllabus of *New York Life Insurance Co. v. Bangs,* 103 U. S. 435, 26 L. Ed. 580:

> "A decree or judgment in such a case can be collaterally attacked and is void, if rendered in a case where a guardian *ad litem* had been appointed without service of process on the infant."

We repeat that this one point is decisive of this case and renders entirely void the final judgment which the Chancery Court of Jasper County sought to render against Petitioners in a case which was not then triable as to any litigant.

IV.

In Proceeding to a "Trial On The Merits" and Approving Decree on Cross-Bill Alone When Mississippi Practice Permitted Only Dismissal With Prejudice.

Here, as usual, the attitude of Respondents is one of confession and avoidance. The Lewis Brief (Page 46) seeks to escape this point by asserting that, "Petitioners are in no position to complain of the procedural steps taken after they walked out and declined to participate".

That position is, we submit, unsound. When Petitioners declined to proceed further they had a right to know that whatever happened to them would take place in strict obedience to Mississippi rules of practice. Petitioners do have a right to complain of the procedural steps taken if those steps were not in accord with accepted tenets of procedure.

Gulf attempts to answer this point (Gulf Br. P. 55-7) by the contention that what happened after Petitioners left the courtroom presents a moot question. That, too, is unsound. If what happened to Petitioners after they left the courtroom involved only dismissal and did not involve the taking up of cross-bills, they had a right to assume that the cross-bills would not be taken up. Yet the decision of the Mississippi Supreme Court in this case assumes dismissal without prejudice, and justifies judgment by default on cross-bills which, under counsel's concession, could not be taken up at all.

Gulf also takes the position (Br. P. 56) that even if the Mississippi trial court did not have a right to reach beyond dismissal and take up the cross-bills as independent pleadings, Petitioners cannot complain if the Supreme Court of Mississippi conceived that the right result was reached, even though a wrong reason was given. Gulf would further hold Petitioners forever bound by the opinion of the Supreme Court of Mississippi, and would deny us the right to invoke review by this Court because they say, "Petitioners have received every consideration whereto they were entitled * * * ".

If that position is sound, then it is true that this Court has the last say when a litigant contends that what a State does under the name of procedure does not square with what the Constitution requires to be done.

V.

In Awarding Judgment Against Petitioners on the Cross-Bill of the Ridgways.

Petitioners contended (Br. 60-2) that it was plain that the Supreme Court of Mississippi attached great importance to the Ridgway cross-bill and that this cross-bill was referred to a number of times in the decision of the Mississippi Supreme Court. That is conceded by Gulf (Gulf Br. P. 58). It is clearly inferable that the Supreme Court of Mississippi would not have reached the conclusion it did without the presence of the Ridgway cross-bill.

We made the point further that the Ridgway cross-bill was not entitled to any consideration at all because it had never been served, and no process had ever been issued or served to bring it before the Court or to require Petitioners to take any notice of it. The Lewis Brief makes no reply to this point, and Gulf's Brief (P. 58) does not claim that there was any legal service of the cross-bill, but takes the position that counsel's *ex parte* statement that it was served was accepted by the Supreme Court of Mississippi, the language of that position being in part as follows:

> "In Mississippi's Supreme Court it was there solemnly said, and is here reaffirmed by counsel at the

> bar, that this cross-bill, along with the answer whereof it is a part, was lawfully served upon Judge Lamar F. Easterling * * * and Judge Easterling before a Mississippi Court, and doubtless here will do the same, affirmed that he would not controvert in any way the declaration of counsel for Respondents that service had been lawfully made."

The Court will understand that there was never any service of this Ridgway cross-bill. Its conclusion appears at Page 455 of the record (Appendix 30). No acknowledgment of the cross-bill is there shown. The position taken is that Gulf's attorney asserts verbally that the cross-bill was served, and asserts that one of Petitioners' attorneys (Judge Easterling) does not deny that it was served.

Judge Easterling's lips are, of course, closed by the proprieties of argument which demand that the case be presented on the record. Suffice it to say that when Gulf's cross-bill was handled between the same parties (R. 400, Appendix 27), Judge Easterling promptly acknowledged in writing the service of that cross-bill and promptly demurred (R. 398, Appendix 25). No such acknowledgment appears to the Ridgway cross-bill, and Petitioners did not demur or otherwise plead with respect to it. The contrast thus presented furnishes Judge Easterling's position as far as the record will permit it to be ascertained.

Assuming, however, the absolute correctness of the quotation from Gulf's Brief, *supra*, that one of Gulf's attorneys advised Supreme Court of Mississippi verbally

that he had served a copy of the Ridgway cross-bill on one of the attorneys for Respondents, and that the last named attorney did not deny that; and assuming further that the Supreme Court of Mississippi "rejected the contention" (Gulf Br. P. 58) that such service would not be sufficient to form the basis of a decree on the Ridgway cross-bill: could the Supreme Court of Mississippi award judgment against Petitioners on such verbal representations? Not if it followed Mississippi law. The Mississippi Code of 1942, Section 1301, dealing with the right of parties through their solicitors to waive prescribed procedural requirements, recognizes such agreements only "if all the parties or their solicitors of record sign and file in the cause a written stipulation to that effect * * *".

Rule 22 of the Supreme Court of Mississippi (quoted in *Majure v. Johnson, infra*) requires:

> "No agreement between counsel will be regarded unless reduced to writing, and signed and filed by them."

The Supreme Court of Mississippi has steadfastly refused to hold litigants bound by agreements not signed by the parties or their solicitors and filed among the papers in the cause—*Mississippi, etc. Co. v. Brookhaven, etc. Co.*, 165 Miss. 820, 147 So. 814; *Majure v. Johnson*, 192 Miss. 810, 7 So. (2d) 545. The last named case refutes the novel position of Gulf in all of its aspects.

There the Supreme Court of Mississippi reversed a decree *pro confesso* taken on an amended bill. It did so even though the party against whom the decree was taken

had, through his solicitor, written a letter which it was contended waived the observance of statutory rules. The letter was never filed and made a part of the record, and the Supreme Court of Mississippi declined to let the decree *pro confesso* stand, using in part this language:

> "This letter was never filed in court or presented to the chancellor. It is no part of the record of the original suit. * * *
>
> "Even though this letter were considered an agreement of counsel, signed by them, we would be precluded from considering it under Rule 22 of this court, which reads: 'No agreement between counsel will be regarded unless reduced to writing and signed and filed by them.' Also, Section 390, Code of 1930, providing that agreements may be a substitute for orders of the chancellor in such matters as enlargement of time for filing answers, continuances, etc., 'if all the parties or their solicitors of record sign and file in the cause a written stipulation to that effect * * *'."

That is the last word of the Mississippi Supreme Court on the subject. That was the law of Mississippi at the time Petitioners declined to proceed further in the chancery court, and at the time of the decision of this case by the Mississippi Supreme Court and up to the present moment.

The Mississippi Court refused to permit Majure's property to be taken upon a decree *pro confesso* based upon a writing because that writing was not filed among the papers pursuant to its requirements. And yet Respondents argue that the Supreme Court of Mississippi has

sanctioned the taking of Petitioners' property by judgment by default on a supposed agreement neither reduced to writing nor filed with the papers. That contention, if correct, would revoke entirely constitutional requirements for due process and equal protection.

VI.

In Proceeding to Judgment on Gulf's Cross-Bill Without Giving Petitioners the Opportunity to Answer and Defend It After the Demurrer to the Cross-Bill Was Overruled and When Petitioners Had Settled With Gulf.

Gulf alone essays to reply to this ten-page argument of Petitioners (Br. 62-71). In that argument Petitioners trace carefully the statutory scheme which must be followed in Mississippi to obtain a valid decree *pro confesso*, and showed its similarity to the general law. As we gather Gulf's argument, it does not question at all our contention of non-compliance with this statutory scheme. Gulf's position may be epitomized by the following quotations brought together from pages 62-5 of its Brief:

> "Thus Petitioners got precisely what they bargained for. * * * and when they withdrew they did not intend to go away off and not come back, but they intended to sojourn at a respectful distance so that they might at their pleasure forthwith return and file an answer to this cross-bill. * * *
>
> "* * * the chancellor, we submit, did precisely what Petitioners expected, precisely what they sought to have him do, and are not now in position to com-

> plain thereof. * * * When the demurrer was overruled and the chancellor had been advised that these parties would not be back, what was the use of waiting * * *
>
> "* * * it is inconceivable that they would have again joined issue when this demurrer was overruled * * *."

Here again Respondents seem to argue that the Chancery Court of Jasper County could do anything it wanted to do after Petitioners had declined to proceed further. Among the things they infer that the chancellor had a right to do was to fail to follow the Mississippi statute requiring that Petitioners be given an opportunity to answer Gulf's cross-bill if their demurrer should be overruled. The argument seems to infer further that the chancellor had a right to decide, without affording this opportunity vouchsafed by the statutory requirements, that Petitioners did not want to contest on Gulf's cross-bill.

All of those things are based, we submit, on a complete failure to comprehend due process of law. Petitioners did not, by declining to proceed further, forfeit their right to rely on the observance of the requirements of orderly judicial procedure. Here Respondents seem to admit that orderly judicial procedure was not followed, but to argue that Petitioners had forfeited their right to rely on it. It is hardly necessary to repeat that it is highly plausible that Petitioners would have consented to litigate with Gulf alone on the narrow issues presented as between Petitioners and Gulf. There is not the slightest inference anywhere that the apprehension of Petitioners

arising from the threats extended to Gulf at all. The point is, however, that orderly procedure required that they be given the opportunity to answer Gulf's cross-bill after the demurrer was overruled. Whether they would have availed themselves of that opportunity is not decisive. Due process cannot be brushed aside with the assertion that the litigant probably would not have protected himself if due process had been accorded him. If, as Respondents seem to argue, Petitioners forfeited anything when they left the courtroom, they certainly forfeited only that which could be taken from them by the observance of accepted rules of procedure.

Gulf's response to Petitioners' argument (Br. P. 69) that Gulf did not resist Petitioners' Motion to Dismiss, places itself entirely on the quotation Gulf uses at the top of Page 67 of its Brief, which refers to the statement of Gulf's attorney with regard to the pendency of Gulf's cross-bill. That argument is entirely misleading.

Petitioners' Motion to Dismiss Without Prejudice was overruled at the January Term of court (R. 605, Appendix 30), and at that time Gulf did not raise any objection whatever, even though the other defendants did object. Gulf does not deny that. Gulf did enter the fray at the following May Term, at which the final decree was sought to be entered. The quotation at the top of Page 67 of Gulf's brief adverted, not to the January Term, but to the May Term—see Record 856-7, Appendix 72-3. Gulf seeks to answer Petitioners' argument that Gulf did not object to the Motion to Dismiss, therefore, by quoting

from what Gulf did four months later at another term of court. The argument of Gulf on this point is wholly without convincing force.

Nor does Gulf make any adequate reply to Petitioners' point, on Page 70 of our Brief, that Gulf did not amend its cross-bill so as to present the true facts to the chancellor. Without question Gulf had settled its controversy with Petitioners. There was nothing to litigate between Gulf and Petitioners because Gulf held leases both from Petitioners and Respondents. Yet Gulf did not apprise the chancellor of that fact. The chancellor acted, therefore, in awarding decree on Gulf's cross-bill, wholly without the benefit of the settlement which had been made between Gulf and Petitioners. Surely if Petitioners had been vouchsafed the chance to answer Gulf's cross-bill, this is one available defense which Petitioners would have asserted. "Due process requires that there be an opportunity to present every available defense."—*American Surety Co. v. Baldwin,* 287 U. S. 156, 77 L. Ed. 231.

VII.

In Awarding Judgment Against Petitioners and in Favor of Gulf in a Case Not Justiciable Because It Had Become Moot.

Decisions of this Court were cited on pages 71, et seq., of our Brief holding that courts will not entertain litigation which does not represent an actual judicial contest between the parties, and that litigants may not invest a court with jurisdiction so to do by their own private

agreement. No Respondent attempts to reply to those cases or to point out any property rights between Petitioners and Gulf which could form the basis for legitimate litigation. *Qui tacent clamant.* This point is, we submit, entirely valid and determinative of the case.

VIII.

In Awarding Judgment Against Petitioners on Cross-Bills Showing No Right to Relief After Original Bill Has Been Dismissed and to Which a Demurrer Had Been Interposed.

To the dozen pages of Petitioners' argument on this point (Brief 74-87) the Lewis Brief attempts no reply at all and Gulf devotes a scant two pages (Gulf Br. 69, et seq.). Gulf first quotes (Gulf Br. 70) what is supposed to be a portion of its brief before the Supreme Court of Mississippi with the confident assertion that the Supreme Court of Mississippi adopted the view there expressed. That quotation is, of course, improper because the briefs before the Supreme Court of Mississippi do not, and could not, constitute a part of the record of the case before this Court. Nor is there any indication that the Supreme Court of Mississippi accepted the supposed argument.

Here again the only reply Gulf seeks to make is that the Supreme Court of Mississippi was dealing with a purely State question, followed by the expression of apprehension on the part of Gulf that this Court would be converted "into a harbor for the consideration of every

type of question and emasculate this Court", if it should be called upon to consider constitutional rights claimed to have been denied by the Supreme Court of Mississippi. The point here, as elsewhere, is that there is no dispute whatever about Mississippi law or its provisions. Petitioners' contention is that they were denied due process of law by the failure of the Mississippi Courts to accord them the protection of the rules admitted to exist. Here, for instance, is what the Mississippi Court said about decrees on cross-bills in the late case of *Majure v. Johnson, supra:*

> "And since a pro confesso is in effect the equivalent of an answer incontestably admitting, but admitting only, the material averments of the bill, it follows, first, that no such decree can be taken while any demurrer or plea or the equivalent of either remains undisposed of * * *."

If, in truth and in fact, Gulf's cross-bill is not sufficient under Mississippi laws and under the decisions of this Court, and that fact be conceded, certainly the hands of this Court are not tied when the acts of the Mississippi Courts are challenged at every step as not in conformity with constitutional requirements.

IX.

By the Decision of the Supreme Court of Mississippi on a Point Never Presented to or Passed on by the Lower Court and Which Petitioners Never Had a Chance to Defend.

The extended argument of Petitioners (Br. Pages 87-95) is not answered, we submit, in the two and a half

pages which Gulf devotes to this point (Gulf Br. 71-3)—the Lewises making no response at all to this point. The series of decisions of this Court demonstrates incontestably that due process requires that all litigants have the opportunity to contest at each step of the proceeding the contention of his adversary as those contentions are raised in obedience to recognized procedure. If Petitioners are to be denied their property rights solely under a cross-bill, due process requires that they be faced in orderly fashion with that cross-bill so that the opportunity to defend it shall be given. Otherwise they would be victims of a springe such as Mr. Justice Holmes condemned in his immortal phraseology in *Davis v. Wechsler*, 263 U. S. 22, 68 L. Ed. 143. It is certainly inferable that Respondents have not made answer to our delineation of the cases of this Court because there is no answer. Petitioners stand denied a trial on the merits because they have been condemned for defaulting in a matter with which they were never faced.

X.

By the Holding of the Supreme Court of Mississippi That the Judgment in a Case Between Petitioners and Gulf is Res Judicata as Between Petitioners and the Lewises, et al., Not Parties to the Cross-Bills.

It is not strange that Gulf devotes less than a page to an attempt to answer our extended argument on this point (Br. P. 95-105) because this ruling does not affect Gulf at all. It is both strange and noteworthy, however, that the Lewis Brief (Lewis Br. 47-8) spends less than

a page replying to that argument and does not mention any of the decisions of this Court cited by us. It is only as the Lewises, et al, may be beneficiaries of the judgment on Gulf's cross-bill that this decision as to them may stand. Our argument on this point is, we submit, wholly unanswerable. The Mississippi cases themselves demonstrate that litigation between Gulf and Petitioners, cannot possibly bind the Lewises, et al, who were not parties to that litigation. If it will not bind the Lewises, et al, it will, of course, not bind Petitioners.

It is perfectly clear from the list of cases discussed on Pages 96, et seq., of our Brief that this Court will examine this whole question of *res judicata* and will pronounce its own judgment on it. The same thing is true of *Chase National Bank v. Norwalk,* 291 U. S. 431, 78 L. Ed. 894, and the other cases cited on Page 105 of our Brief.

Here again it is clear, we submit, that no effort is made to answer our argument because there is no answer which can be made.

CONCLUSION.

A careful analysis of the briefs filed on behalf of the Respondents reveals, we submit, that it is not seriously contended that the Mississippi Courts have not committed error in the respects claimed by us. Theirs is rather a plea of confession and avoidance. In each instance they are driven back to the position, which they constantly reiterate, that the questions at issue were questions of

state procedure and that the decision of the Mississippi Court is final. Boiled down, what they say to Petitioners is something like this:

> "It is true that you had a right to dismiss without prejudice, and that you were invited to come into the State Court and try your case under the protection of armed guards at a time when you were insisting on your right to proceed with your Federal cases, and after you were denied interlocutory appeals; it is true that the case was not triable when the final judgment was entered, and that in any event the chancery court could proceed no further than dismiss your suit with prejudice; it is true that the Supreme Court of Mississippi affirmed the decision because of the presence of the Ridgway cross-bill which had not been served, and that the demurrer to Gulf's cross-bill was overruled without giving you an opportunity to answer; it is true that when the judgment was rendered on Gulf's cross-bill, Gulf did not advise the Chancery Court that the issues between you and Gulf had been settled, and that this issue, therefore, was moot; it is true that you have been held in default for not defending a cross-bill when that situation was never presented to you, and it is true, finally, that you have been held to an adjudication of your rights with the defendants other than Gulf and Ridgway when *res judicata* does not extend to a foreclosure of your rights with those other litigants.
>
> "All of these things are true, but all of them relate to matters of practice and procedure in the Courts of Mississippi, and the decision of those courts was predicated entirely on those procedural points. The courts of Mississippi have patiently given you your day in court and you are not entitled to complain."

If that position be sound, then the Constitution is not the supreme law of the land and this Court has been doing a lot of writing in vain;—all the way from *Yick Wo v. Hopkins,* 118 U. S. 356, 30 L. Ed. 220, down to *Angel v. Bullington,* L. Ed. Advance Opinions March 10, 1947, Page 557. If that position be sound, then it is not true that every litigant is entitled to the equal protection of the laws, and that due process of law requires that he be given the benefit of adequate and lawful procedural requirements. That position completely rejects the idea that every procedural step is "fettered" by constitutional requirements, and that constitutional rights cannot "be defeated under the name of local practice"; it asserts that a state court can "sterilize federal claims by putting on the adjudication a local label"; it proclaims that a state court may "put a federal claim aside as though it were not in the litigation by the talismanic word procedure".

This Petition, we submit, presents the strongest possible claim that this Court extend to these non-resident litigants protection "by the grace of certiorari".

LAMAR F. EASTERLING,
GEORGE E. SHAW,
LESTER C. FRANKLIN,
ROBERT E. PERRY,
LESTER E. WILLS,
BEN F. CAMERON,
Solicitors for Petitioners.

This is to certify that copies of this Brief have been served on opposing counsel on this the .... day of September, 1947.

.....

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 262

N. L. HUDSON, ET AL.,

Petitioners,

vs.

GULF REFINING COMPANY, ET AL.,

Respondents

R. E. WILBOURN,
WALTER S. WELCH,
IRWIN W. COLEMAN,
STONE WELLS,
W. H. WATKINS, SR.,
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Jackson, Mississippi.



SUPREME COURT OF THE UNITED STATES

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Petitioners,

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GULF REFINING COMPANY, ET AL.,

Respondents

Now comes the Gulf Refining Company, a corporation, L. E. Ridgway, et al., enumerated in the answer and cross bill as the "Ridgway group" and so herein designated, and for answer to the application of the petitioners to proceed herein without complying with the rules as to printing the record, respectfully say:

A

The judgment in the Supreme Court was adverse to petitioners, who had given an appeal bond with sureties as Lamar F. Easterling, George E. Shaw, Lester C. Franklin, Lester E. Wills and Ben F. Cameron. The judgment in the State Supreme Court, as to costs, was against petitioners and said sureties. Said sureties did not join in this appeal. Compare *Hartford Accident & Indemnity Company* v. *Bunn*, 285 U. S. 169, 76 L. Ed. 685. As this appeal was from a State Court, Rule 74, probably is not applicable and it is ques-

tioned whether any appeal has been taken as the judgment became final May 19, 1947.

B

1. Respondents respectfully suggest that the printing of the record as by Rules required will not, when modified in accordance with proposed stipulations as assented to by respondents, impose any extreme hardship.

2. Petitioners should not be herein permitted to proceed in *forma pauperis*, if for no other reason than that the respondents have paid in actual cash to petitioner for protective leases in this litigation $56,000.00.

3. On August 21, 1947, these respondents received:

(a) A certain stipulation document reciting certain facts, whereto reference is made.

(b) Petition for Certiorari with a brief in support thereof.

(c) An Appendix to Petition for Certiorari.

Respondents aver upon information that petitioners are in default for not printing the record as required by the Rules of this Court and upon such default respondents specifically desire to rely, with this qualification: Respondents are informed that this application for Certiorari is groundless and is made for purposes of delay and that the Gulf Refining Company has retained royalty payments as at the present time aggregating many thousand dollars, and the Tidewater Associated Oil Company has as to similar royalty as at the present time done the like, which royalties are held up solely in virtue of these proceedings, and that thereasto respondents, other than the Gulf Refining Company and Tidewater Associated Oil Company, respectfully suggest that penalties are imposable under Rule 30 of

this Court and these respondents do not desire any delay whatsoever to occur in the consideration of this application for Certiorari, which they aver, upon information, is wholly groundless.

4. Subject to the foregoing, respondents respectfully say that they received in due course of mail Exhibit "A" hereto from petitioners setting forth specifically that which should be printed.

5. After due consultation, these respondents thereto made response to said petitioners as shown by Exhibit "B" hereto annexed and made part hereof as if fully copied herein, filing the same with the Clerk of the Supreme Court of Mississippi, and respondents say that they are advised that in order to accurately present this case to this Court the matters aforementioned are requisite and necessary and that without them this Court may not give to this cause that attention which its importance demands.

6. Respondents say that on the 10th day of June, 1944, petitioners impetrated this suit in the Chancery Court of Jasper County, First District, Mississippi, therein filing the original bill. Thereafter these respondents and others made parties thereto, more than 100 in number, answered and filed cross bills.

7. That upon the 15th day of December, 1944, the first protective lease, so-called, was executed containing this express provision:

> "* * * And, further, notwithstanding any provisions of this lease apparently to the contrary, it is agreed and understood that Lessor shall not be entitled to and Lessee shall be under no obligation to pay to Lessor any of the royalties, or any part thereof, provided for herein unless and until in the suit entitled N. L. Hudson, et al., complainants, vs. The Gulf Refining Company, et al., defendants, No. 398, Chancery

> Court for the First Judicial District, Jasper County, Mississippi, lessor shall have established by a compromise settlement between the parties thereto, or by final decree of the court therein, that the lessor herein is the owner of the lands and minerals hereby leased and involved in said suit or the owner of an interest therein."

8. Thereafter, about June, 1945, additional counsel were retained by petitioners and shortly thereafter the idea of transferring this litigation from the State Court to the District Court was initiated, counsel for petitioners, being thereasto fully examined in Cause No. 270, et al., in the District Court, and went so far as to recast a deed made to the first counsel for petitioners on the ground that inadvertently the land was conveyed to counsel when it was intended only to convey them a proportionate participation in the proceeds.

9. Thereafter, on December 11, 1945, these four suits, *Hudson* v. *Newell,* No. 270; *Hudson* v. *Lewis,* No. 271; *Hudson* v. *Windham,* No. 272; and *Hudson* v. *Jones,* No. 278 (this last, however, filed on January 15, 1946), were assumed to be filed in the District Court involving precisely the same land but covering only 340 acres, omitting the 20 acres whose ownership was so widely held by citizens of the same States as that it was impossible to initiate this suit. As to the other three suits, the petitioners consciously omitted all residents of Louisiana and Texas and after full argument upon the 24th day of April, 1946, District Judge Mize overruled these motions to dismiss, assuming that he could by his decree confine them to those persons who were validly before his court without affecting the rights of those persons who had been consciously omitted by petitioners.

10. Respondents called attention to *Veal* v. *Thompson*, 138 Tex. 341, 159 S. W. 2d 472, wherein the effect of unitization upon mineral ownership is adjudged. Mississippi has almost uniformly followed the Texas decisions. Compare *Stokely* v. *State*, 149 Miss. 435, 115 So. 563; *Merrill Engineering Co.* v. *Capital National Bank*, 192 Miss. 378, 5 So. 2d 666; *Koenig* v. *Calcote*, —— Miss. ——, 25 So. 2d 763.

11. After the rendition of this ruling by Judge Mize, the Circuit Court of Appeals of the Fifth Circuit decided *Keegan* v. *Humble Oil & Refining Co.*, 155 Fed. 2d 971, on June 13, 1946, rehearing denied July 23, 1946, and specifically approved the Texas rule as to indispensable parties under unitization agreements.

12. The Circuit Court of Appeals reversed Judge Mize in *Calcote* v. *Texas Pacific Coal & Oil Co.*, decided July 31, 1946, 157 Fed. 2d 216, Certiorari denied November 18, 1946, 328 U. S. (No. 1) 29, 91 L. Ed. 80, Rehearing denied December 9, 1946, 328 U. S. (No. 1), 30, 91 L. Ed. 242, showing the absolute want of jurisdiction in the Federal Court in a diversity suit involving, if you please, a reformation of a contract whereunder all parties participating in the ownership were uniformly bound without making those parties who were citizens of Louisiana and Texas parties thereto in any way.

13. Thereupon, with Cause No. 398 in the Chancery Court of Jasper County still pending, these four Federal suits were filed as aforesaid, and thereupon on December 12, 1945, before the Clerk of the Chancery Court of Jasper County, in vacation, pursuant to Section 1539, Mississippi Code of 1942, petitioners made a motion to dismiss in vacation without paying the costs accrued to that date and without assigning any reason whatsoever therefor, especially naught as to alleged threats.

14. Petitioners did not take an order before the Clerk in vacation but parties being interested got notice thereof and objected especially the royalty owners whose responses thereto in part are fairly stated in the Appendix 30-41, and may be epitomized thus:

(a) These respondents under these protective leases had obtained in the prosecution of Cause No. 398 certain rights substantially as by decretal order of which petitioners as complainants could not deprive them.

(b) As to the Gulf Refining Company and the Ridgway group, cross bills had been interposed and to the Gulf's cross bill a demurrer had been filed. As to the Ridgway group cross bill, when petitioners moved to dismiss the entire suit, of necessity there was thereby appearance entered to this cross bill, there being no such things in Mississippi as "special appearances". Compare *McCoy* v. *Watson*, 153 Miss. 416, 121 So. 116; *Afro-American Sons and Daughters* v. *Webster*, 172 Miss. 602, 161 So. 318.

(c) In addition, in the State court it was not denied by Judge Easterling that due process of service of the Ridgway group cross bill was made on him, his comments on such practice being embodied in Exhibit "C" hereto appended.

(d) No response to this motion for dismissal under Mississippi practice was required. Compare *Hudson* v. *Gulf Refining Co.*, — Miss. —, 30 So. 2d 66; *Griffith's Chancery Practice*, Sec. 407; *Reed* v. *State*, 143 Miss. 686, 109 So. 715; *Martin* v. *Board of Supervisors*, 181 Miss. 363, 178 So. 315; *Hall* v. *Franklin*, 814 Miss. 77, 185 So. 591.

(e) The hearing on this motion was then had without objection by petitioners at the January Term of the Chancery Court, no pretense as to any threats being then made. Appendix 41-63.

(f) Thereafter the Chancellor, in vacation, entered his decree. Appendix 63.

(g) Therefrom, petitioners endeavored to appeal to the Supreme Court of the State of Mississippi and try the cause piecemeal and one Judge of the Supreme Court, with concurrence of others, declined to take jurisdiction. No record of any alleged threats at this time. Thereupon, the Chancellor called a special term of the Jasper County Court for the trial of all cases—not the *Hudson* case in particular—and the Chancellor for reasons to these respondents wholly unknown assumed to write a confidential letter which appears in Appendix page 63. In response thereto, these respondents say:

(a) On the oath of these solicitors there were no threats of any kind or character by their several clients and as to the others they have no knowledge that there were any such and they desired then and desire now flatly to challenge, first, the making, and, second, the effect, if any, of such alleged threats, protesting vigorously that none such occurred, but if they did, then

(b) Petitioners did not plead these threats in Cause No. 398.

(c) Petitioners did not allege the nature of such alleged threats, nor by whom same were made, nor did petitioners set up the language of any specific threat, nor attempt to prove any alleged threats in Cause No. 398.

(d) Under Mississippi practice personal knowledge of the Chancellor may not be integrated into the record. *Armstrong* v. *Jones,* 198 Miss. 627, 22 So. 2d 7, holding the principle of law beginning with *Smith* v. *Moore,* 3 How. 40, precluded any judge from assuming to act on any information alleged to be personally possessed, but Judge Neville

did not say that he possessed personally this information.

If these respondents had made those threats as to any counsel of petitioners and petitioners had proved those threats before Judge Neville, then there would have been such evidence as would have authorized Judge Neville to have acted thereon, but there was no such proof offered before or submitted to the trial Court. Compare 31 C. J. S., p. 880, Sec. 179; 62 A. L. R. 136.

But in no sense would it have made it a Federal question, because the State did naught thereasto. In the precisely similar case of *Moore* v. *Pate,* 39 Fed. 2d 616, certiorari denied 282 U. S. 853, 78 L. Ed. 755, Mr. Hirsch, without challenge as to accuracy, declared:

> "Why Mr. Pate went so far as to say in open court—in the State court while this matter was pending in the District Court that if Moore won this property by decree of the court he would kill appellant's attorney, Redmond."

And yet the Court of Appeals held the State judgment *res adjudicata* with certiorari denied.

15. But when the May Term came, there likewise appeared counsel for petitioners and when they were in open court there was a colloquy between court and counsel thus recorded (Appendix, 75):

> "I understand you all agree it is not necessary to enter any order on the allegations in the exceptions with reference to the threats, that this Court cannot protect its litigants and solicitors.
>
> "I will proceed with the trial of the case."

And respondents say that there were no deputies then present and everything at that term was as quiet as could be, and insofar as the certified record shows, no entry was ever made of record on the minutes of the Court as to this matter.

16. At that term, petitioners appeared and interposed an objection, Appendix, 64, predicated upon possibly three separate grounds:

(a) The absolute right to dismiss.

(b) A totally insufficient pretense as to threats reading thus:

> "Said District Court of the United States is, as aforesaid, proceeding with the trial of said issues, and is ready and able to proceed with such trial free of any atmosphere of threats or intimidation or oppression, and under such circumstances that the witnesses and all who engage in the trial may perform their respective parts without fear of violence, and without intimidation or oppression." (Appendix, 69).

(c) Pendency of Federal Court actions precluding State Court's assertion of jurisdiction and they then asked that no order be thereon entered, indicating at that time that they had no desire whatsoever to make a record other than to direct attention to the pendency of the Federal Court suits.

17. But being advised that the Court had assembled to hear this case, they consciously withdrew and after they had so done, in the final decree, Judge Neville specifically found (Appendix, 76):

> "* * * and there being no motion for or grounds for a continuance of the said cause, announced that the trial thereof should proceed * * *."

Thereupon, appeal was assumed to be had and the action of the Chancery Court was assailed in the Supreme Court by an assignment of errors containing nine grounds, Appendix 79, all of which obviously were without merit as Federal questions, and relate exclusively, with deference, to State questions, and then as a conclusion there is a vague ref-

erence to the Federal Constitution substantially predicated upon the ground that an erroneous decision by a State Court between private litigants under State law is a deprivation of property and a denial of the equal protection under the Fourteenth Amendment.

18. Thereupon, after full argument, the Supreme Court of Mississippi affirmed the decree of the Chancery Court and an analysis of this opinion shows:

(a) That done, through and including the words:

> "The answer and cross-bill of Gulf Refining Company was filed on September 16, 1944, and those of the other twenty-five cross-complainants on September 30, 1944. On December 12, 1945, the complainants filed a motion to dismiss their original bill aforesaid without prejudice, which motion was actively resisted by numerous of the original defendants, and the motion was overruled."

It was a statement of the case.

(b) Then Justice Smith said (Appendix, 84):

> "Had there been no cross-bills, it may have been that the complainants would have had the right to dismiss, as they sought to do, but leaving that question aside for the moment, we are of the opinion that they had no right to do so and at the same time secure the dismissals of the cross-bills, unless by the consent, express or implied, of the cross-complainants."

Thereafter, without passing upon the other issues interposed, Mr. Justice Smith dealt solely with the State issue as to the effect of the cross bill and confined, substantially, his opinion to that one aspect, determining that aspect adequate for a decision of the cause. He did not undertake to determine any other question, either Federal or State.

(c) Note (Appendix, 87):

> "We are of the opinion, therefore, that the court was correct in not dismissing the cross-bills, and in proceeding to a final hearing on them, without the attendance of cross-defendants, who purposely absented themselves; * * *."

Then, having discussed solely the effect of the retention of the cross bill under Mississippi practice and the right under Mississippi practice to have an adjudication against the persons who wilfully absented themselves from Court, we have

(d) The conclusion of Mr. Justice Smith that he would not consider the other aspects but would predicate the affirmance of the judgment solely upon the right under Mississippi practice under a cross bill retained in a case where the petitioners abandoned the court.

19. The Chancery Court, when these parties withdrew protesting they would not further act, proceeded to hear evidence establishing that petitioners had absolutely no title. The plaintiffs being non-residents and having thus done, it would have been competent for Mississippi to have authorized the bill to have been dismissed and final judgment rendered against them for failing to answer. Compare *Hammond Packing Co.* v. *State of Arkansas,* 212 U. S. 322, 53 L. ed. 530; Annotation, 144 A. L. R. 372; *Equitable Life Assurance Society* v. *Clark,* 80 Miss. 471, 31 So. 964; *Illinois Central R. Co.* v. *Sanford,* 75 Miss. 862, 23 So. 355, 942, approved in the *Hammond* case directly.

Therefore, upon the line of demarkation between due process under *Hovey* v. *Elliott,* 167 U. S. 409, 42 L. Ed. 215, and that authorized by the statute, the Chancellor permitted this evidence to come before him to find out what really were the facts and especially to be fully advised as there were

rights of minors, and having found, the facts are unquestionably in favor of the respondents. Therefrom, it appeared that a public record had been made showing an absolute title from N. L. Hudson to Mary E. Hudson, Appendix, 83. It further appeared that every attorney who was familiar with these records was put on the stand and testified in the District Court proceedings at the instance of the Hudsons and in this hearing at the instance of the respondents and all showed the title in fee simple with no life estate. Opinon of the Supreme Court of Mississippi, Appendix 83:

> "* * * Hudson had made to his wife, M. E. Hudson, on January 23, 1880, a deed to the lands in fee simple absolute, this deed being recorded in Book 20, page 135 of the records of deeds of the county. * * *."

Under these facts, with deference, we submit that the full record should be printed so as that the factual background could be made clear and therefrom demonstrated that the decision of the Chancellor was strictly on local questions, the affirmance strictly on local questions by the Supreme Court with the recitation that one local question was thereasto adequate.

So that, if this matter is to be presented to this Court, we submit that each of these additional items should be printed as a part of the record so that this Court might see, both from the original record and from the suggestion of error, which was overruled, that the State Court had ample ground upon which to base its finding and, with deference, there is no authority thus to allow petitioners so circumstanced to appeal without presenting to the court the entire transaction with its full factual background, there being, with deference, here no hardship as to the stipulated portions of the record, counsel for petitioners having initially conceded that substantially all that herein contended for

was essential and having changed his mind after the initial proposed stipulation was submitted. With deference, there is no valid reason therefor and petitioners predicate their right of recovery upon an alleged deed from N. L. Hudson to his wife allegedly executed about 1880. All of the records in Jasper County were destroyed September 10, 1932, but respondents claim under a deed not in their possession, not of record and of which they had no copy, that N. L. Hudson, who died about 1895, had conveyed a life estate to his wife, Mary E. Hudson, and that at her death, which occurred in 1928, the title vested in the heirs at law of N. L. Hudson, as purchasers and that the statute of limitation did not run by reason of this condition, it being conceded that those under whom respondents claim have been in possession since approximately 1900 under deeds conveying to them the absolute title. Compare as to the statute of limitations, *Peeples* v. *Boykin,* 132 Miss. 359, 96 So. 177, which question the Supreme Court of Mississippi could have determined in favor of respondents but presumptively if the jurisdiction is transferred to the District Court, that Court would have been precluded from this doing. Compare *Edward Hines Yellow Pine Trustees* v. *Martin,* 268 U. S. 458, 69 L. Ed. 1050.

Upon behalf of these respondents, we protest vigorously but seek no delay.

In due time, without foregoing respondents' rights hereunder, response will be made to the petition for certiorari and the brief thereon.

Respectfully submitted,

R. E. WILBOURN,
WALTER S. WELCH,
IRWIN W. COLEMAN,
STONE WELLS,
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Jackson, Mississippi.

EXHIBIT A

Copy

June 13, 1947.

No. 36,406

N. L. HUDSON, et al.

v.

GULF REFINING Co., et al.

Mr. I. W. Coleman, Messrs. Stevens & Stevens, Messrs. Watkins & Eager, Messrs. Wells, Wells, Newman & Thomas, Messrs. Green & Green, Jackson, Mississippi.
Messrs. Wilbourn, Miller & Wilbourn, Meridian, Mississippi.
Messrs. Welch & Cooper, Mr. J. R. Buchanan, Mr. A. S. Scott, Messrs. Beard & Pack, Mr. Larry Pacific, Laurel, Mississippi.
Mr. F. C. Hathorn, Sr., Hattiesburg, Mississippi.

GENTLEMEN:

Complainants in the court below, N. L. Hudson, et al., will apply to the Supreme Court of the United States for a certiorari and/or appeal from the decision of the Supreme Court of Mississippi. Under Rule 38, subdivision 8, of the Rules of the Supreme Court of the United States and other provisions of those rules, the attorneys for the litigants are required to stipulate to omit from the printed record all matter not essential to a consideration of the questions presented by the petition or appeal. To that end I have prepared, and am sending herewith, a stipulation of the portions of the record to be certified by the Clerk of the Supreme Court of Mississippi. I hope, and believe, that everything essential is covered, and that indeed quite a little more may be omitted. I shall be glad to join in omitting such other parts as you gentlemen may think non-essential.

I will greatly appreciate it if you will sign this stipulation if you find it proper. At all events, kindly let me hear from you at the earliest possible date so that we may get our proceedings under way.

Yours sincerely, Ben F. Cameron.

C:E. enc.

SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 36,406

N. L. HUDSON, et al., Appellants,

v.

GULF REFINING COMPANY, et al., Appellees

STIPULATION COVERING RECORD TO THE SUPREME COURT OF THE UNITED STATES

It is hereby stipulated and agreed between the attorneys representing the parties to the above styled action that the Clerk of the Supreme Court of Mississippi shall copy and certify the following papers and documents, together with all exhibits thereto, on file as a part of the record in the Supreme Court of Mississippi, and that said documents, together with the stipulation following their enumeration, shall constitute the entire record in the Supreme Court of the United States, to-wit:

Bill of Complaint	1
Amendment to Bill of Complaint	441
Motion of Complainant to Inspect Books of Gulf	471
Second Amendment to Bill of Complaint	550
Motion of Claudies Newell, et al to Stay Proceedings	119
Answer of Mason Newell, et al	175
Answer of T. D. Lewis, et al	204
Answer of Carrie Kelly Husband, et al	242
Supplemental Answer of T. D. Lewis, et al	257
Answer and Cross-Bill of Gulf Refining Company	271
Answer of P. R. Bethea, et al	401
Answer of C. R. Ridgway, et al	452
Supplemental Answer of P. R. Bethea, et al	462
Answer of Tidewater Associated Oil Co.	465
Answer of Gulf Refining Co. to Motion to Inspect Books	524
Answer of Cora B. Bradford, et al	557

Answer of Thomas Melvin Lewis	588
Motion of Lucius Cook Lewis, et al	594
Decree thereon	596
Demurrer of Complainants to Cross-Bill of Gulf Refining Co.	398
Motion of Complainants to Dismiss Without Prejudice	605
Answer of Defendants Lewis, et al, to Motion to Dismiss	606
Answer of Cora B. Myers, et al to Motion to Dismiss	661
Answer of George J. Leiderman, et al. to Motion to Dismiss	678
Supplemental Answer of T. D. Lewis, et al. to Motion to Dismiss	695
Answer and objection of —— to Non-Suit by Complainants	713
Transcript of Evidence on Hearing of Motion to Dismiss, appearing as pages	753–852
Reply of Complainants to Answer of Defendants on Motion to Dismiss	708
Order taking Motion to Dismiss under Advisement	707
Order overruling Complainants' Motion to Dismiss Without Prejudice	721
Application of Complainants for interlocutory appeal	722
Order Denying Interlocutory Appeal	723
Order Calling Special Term of Court for May 6, 1946	
Objection of Complainants to Hearing Cause	724
Transcript of Evidence at Special Term Until Withdrawal of Complainants	854–859
Final Decree	749–A
Order Adjourning Special Term	
Petition for Appeal	750
Appeal Bonds	
Assignment of Errors by Appellants	
Order of Supreme Court of Mississippi entered April 21, 1947, Affirming the decree of the Chancery Court of Jasper County	

Opinion of Supreme Court of Mississippi....
Motions of Appellants that Suggestion of Error be Heard by Court In Banc.....
Order of Supreme Court Entered May 12, 1947 Overruling Motion for Hearing In Banc....
Order of Supreme Court of Mississippi of May 19, 1947 Overruling Suggestion of Error
Order of Supreme Court of Mississippi of June 2, 1947 Overruling Motion to correct Judgment
All other orders of Supreme Court of Mississippi which may be entered subsequent to the foregoing Orders and before the transcript is completed and certified .....

It is further stipulated that the following answers were filed by defendants claiming to own mineral interests through certain of the defendants claiming the fee, the dates of the filing and the pages of the record being shown in each instance, and the Clerk is requested to copy the names of all such defendants so filing answers:

		Page
9-4-44	Answer of George J. Leiderman.....	146
9-7-44	Answer of Mrs. Mamie M. Abney.....	230
9-8-44	Answer of John F. Riddell and others.....	264
9-8-44	Answer of Carl B. Anderson, Jr., et al.....	266
9-22-44	Answer of Defendants, S. J. Hooper and H. A. Smith	336
10-3-44	Answer of Joseph M. Perkins, et al.....	405
1-18-45	Answer of Claud B. Hamill, et al.....	450
1-12-46	Answer of Florence H. Abney, et al.....	640

It is further stipulated that said answers relied on the same facts and points of law as those of the defendants copied in the record pursuant to this stipulation, and no more, and that said answers did not contain any cross-bill or any prayer for affirmative relief.

It is further stipulated that all of the answers and responsive pleadings filed by any defendant to complainants' Motion to Dismiss Without Prejudice are set forth in the record in full, together with exhibits, and that defendant,

Gulf Refining Company, did not file any answer or responsive pleading to Complainants' Motion to Dismiss Without Prejudice.

Witness the signatures of the parties by their attorneys of record this — day of June, 1947.

BEN F. CAMERON,
Attorneys for Appellants,
N. L. Hudson, et al.

——— ———,
Attorneys for Appellees in the Supreme Court of Mississippi as indicated.

EXHIBIT B

July 18, 1947.

Mr. Ben F. Cameron
Cameron & Wills
Meridian, Mississippi
Dear Mr. Cameron:

In Re: Hudson vs. Gulf Refining Company
Certiorari to Supreme Court

Pursuant to a conference had between the attorneys for Gulf Refining Company and the Ridgway Group, we are willing to stipulate as to the record before the Supreme Court of the United States, and so far as the above parties are concerned, it is quite essential, from their viewpoint, that to satisfy their requirements, the following should be made a part of this record on appeal. You may stipulate with any other person for any other portion of the record that you and they may desire, and its inclusion or exclusion, so far as these parties are concerned, is immaterial and a matter solely for you and them.

	Record Page
Bill of Complaint	1
Amendment to Bill of Complaint	441
Motion of Complainant to Inspect Books of Gulf	471
Order of Court on such Motion	
Second Amendment to Bill of Complaint	550

	Record Page
Answer and Cross Bill of Gulf Refining Co.	271
Answer and Cross Bill, C. R. Ridgway, et al.	
Answer of Gulf to Motion to Inspect Books	524
Order extending time within which the Cross Bill of Gulf Refining Company might be responded to	
Demurrer of Complainants to Cross Bill of Gulf Ref.	398
Motion of Complainants to Dismiss Without Prejudice	605
Answer of Defendants Lewis, et al., to Motion to Dismiss	606
Answer, Cora B. Myers, et al., Motion to Dismiss	661
Answer, George J. Leiderman, et al., Motion to Dismiss	678
Supplemental Answer, T. D. Lewis et al., Motion to Dismiss	695
Answer and objection Jettie Kelly Windham to Non-Suit by Complainants	713
Transcript of Evidence on Hearing of Motion to Dismiss. (This may be epitomized, if desired), appearing pages	753–852
Reply of Complainants to Answer of Defendants on Motion to Dismiss	708
Order taking Motion to Dismiss under advisement	707
Order overruling Complainants' Motion to Dismiss Without Prejudice	721
Application of Complainants for Interlocutory Appeal	722
Order denying Interlocutory Appeal	723
Order calling Special Term of Court for May 6, 1946	
Objection of Complainants to Hearing Cause	724
Transcript of Evidence at Special Term until Withdrawal of Complainants	854–859

and the following stipulation, so far as these parties are concerned:

After Complainants' attorneys assumed to withdraw, The Gulf Refining Company, the Ridgway Group (embrac-

ing all of those parties named in the Ridgway answer and cross-bill), and the other named defendants, caused to be introduced before the Chanceller certain oral and documentary evidence, wherefrom it might be correctly found, both as a matter of law and of fact, if believed, that Mary E. Hudson, the wife of N. L. Hudson, and Mother of complainants, assumed to convey in fee simple to each of the persons claiming under and through her, and that these persons and their successors in title have been in the open, notorious, exclusive and adverse possession of said land, in accordance with their several deeds, claiming the same as their own. They farmed this land, cut timber therefrom, constructed buildings thereon, paid the taxes thereon, and there was no interference with said use and occupation until the bill was filed in this cause, No. 398. Such possession and claim of such parties to said lands was continuous for more than 10 years prior to the filing of the bill in said cause No. 398.

There were introduced as witnesses, Madison Travis, J. A. McFarland and Henry L. Finch, all practicing attorneys, who are the sole attorneys up to this date introduced by Complainants in the District Court of the United States for the Eastern Division of the Southern District of Mississippi, in those certain suits therein numbered and styled:

#270 Hudson v. Newell, et al.
#271 Hudson v. Lewis, et al.
#272 Hudson v. Windham, et al.
#278 Hudson v. Jones, et al.

who swore both in their depositions taken in the United States District Court cases at the instance of plaintiff and on the trial in cause No. 398, that the records at the county seat, Paulding, which had been destroyed by fire on September 10, 1932, precedently contained an absolute conveyance in fee from N. L. Hudson to Mary E. Hudson, and that Mary E. Hudson did not take any life estate. There is presently of record, duly established and recorded pursuant to Sections 762, 763 and 764, Mississippi Code of 1942, one of these abstracts made by the said Madison Travis, which is to be, insofar as these conveyances by N. L. Hudson to Mary E. Hudson, copied in full.

Jasper County, Mississippi, prior to the discovery of oil, had very few lawyers resident, and the foregoing Travis, Finch and McFarland are, so far as known, the sole persons who, as attorneys, were acquainted with these records who are presently alive and available.

The Gulf Refining Company took leases from each of the separate landowners and placed the same of record in the year 1937 and before any oil field had been developed in Mississippi.

If the substance of the foregoing may not be agreed on, the actual testimony may be epitomized and condensed, with elimination of irrelevant and inconsequential portions.

Final Decree 749-A
Order Adjourning Special Term.....
Petition for Appeal 750
Assignment of Errors by Appellants.....
Order of Supreme Court of Mississippi entered April 21, 1947, affirming decree of the Chancery Court of Jasper County .....
Opinion of Supreme Court of Mississippi.....
Motions of Appellants that Suggestion of Error be heard by Court In Banc .....
Suggestion of Error .....
Order of Supreme Court entered May 12, 1947, Overruling Motion for Hearing In Banc.....
Order of Supreme Court of Mississippi of May 19, 1947, Overruling Suggestion of Error.....
Order of Supreme Court of Mississippi of June 2, 1947, Overruling Motion to Correct Judgment..
All other orders of Supreme Court of Mississippi which may be entered subsequent to foregoing Orders and before the Transcript is completed and certified.....
Appropriate Appellate proceedings to the Supreme Court of United States.....

It is stipulated that the defendant, Gulf Refining Company, did not file any answer or responsive pleading to Complainants Motion to Dismiss without Prejudice. There was no pleading filed by complainants, except insofar as the

record above set forth shows, predicating any right of relief upon any threats of any kind or character, and complainants did not introduce any evidence of any threats of any kind or character whatsoever, except as expressly set out in this stipulated record. At the hearing at the May Term, 1946, no reference whatsoever was made to any threats in open Court by any person other than set forth in complainants' objection. There were no armed deputies present. There was no searching of any person for weapons, and the proceedings had in the Chancery Court were quiet, orderly, and possessed all the essential judicial requisites as to decorum.

Yours truly,

GREEN AND GREEN,
By —— ——.

EXHIBIT C

December 7, 1944.

JUDGE LAMAR EASTERLING
Deposit Guaranty Bank Bldg.
Jackson, Mississippi.

Re: Hudson v. *Gulf Refining Company*

DEAR JUDGE:

This will confirm conversation had with you over the telephone this morning relative to the above titled cause, in which you said that substantially the reason you demurred to our cross-bill was that you didn't want to go to the trouble of writing an answer. Of course, we have no desire to put you to unnecessary trouble, but we didn't want to have a delayed hearing when the matter came up because, frankly, our witnesses are going to be numerous and expensive.

In answer to this you made the statement that, if we went to trial, as was, and the Court held that the Hudson's

were not entitled to any relief, then, of course, our people would be entitled under that to hold to their lease and it would be quite immaterial to you what happened further, and that you would go to the extent in that case, after the decree became final, of giving us a quit-claim.

Under these circumstances, my thought is that there is no necessity for any argument on this demurrer, but try the case on its merits. If we win, then we can write the decree and, if we lose, there won't be anything to confirm, so that it thus becomes rather immaterial as to what happens on the demurrer, whether it be overruled or sustained, and we can pass it according to the merits and let the decree take care of the rights of the respective parties.

With kindest regards.

Yours very truly,

GARNER W. GREEN.

GWG:E.

cc R. E. Wilbourn, W. S. Welch, Judge Atkinson.

SUPREME COURT OF THE UNITED STATES

No. 262

N. L. HUDSON, et al., *Petitioners,*

v.

GULF REFINING COMPANY, et al., *Respondents*

Now come Talmadge D. Lewis, his wife Annie Lewis, and members of their family; Cora B. Myers Bradford, individually and as guardian for her children, Clifton Myers, Simon Myers, and James Myers; Mason Newell, individually and as guardian for Alfonso Newell, Juanita Newell, and Mason Newell, Jr., minors, and Claudies Newell and Paul Ellis Newell; and George J. Leiderman, some of the respondents in the above styled cause and for brevity adopt the answer of the Gulf Refining Company and the Ridgway group to the application of petitioners to dispense

with the printing of the record; and hereby respectfully supplement said answer, so far as the interest of these respondents is concerned, by the following to-wit:

Respondents other than the Talmadge D. Lewis family as above named are represented by J. R. Buchanan, Attorney at Laurel, Mississippi. Talmadge D. Lewis, his wife, and family are jointly represented by said Buchanan and by the undersigned J. Morgan Stevens of Jackson, Mississippi. These respondents made response to the proposed stipulation made Exhibit A to the answer of the Gulf and Ridgway group and on behalf of his clients J. R. Buchanan made a counter-proposal to the Honorable Ben F. Cameron, leading attorney for petitioners, with reference to the abridgement of the record. Said counter-proposal being shown in a letter dated July 22, 1947, copy of which is hereto attached as Exhibit No. 1. J. Morgan Stevens, through his law firm, Stevens and Cannada, made a similar counter-proposal to said Ben F. Cameron as reflected by copy of letter of July 23, 1947, attached hereto as Exhibit No. 2. No written response was made by said Cameron to either of the letters so written by the attorneys for these respondents, but these attorneys were advised on the telephone by said Ben F. Cameron that he could not agree to the counter-proposals and had directed the clerk to certify a copy of the entire record. The counter-proposals would eliminate all of the oral and documentary testimony taken upon the final trial of this case in the Chancery Court of the First Judicial District of Jasper County, provided the agreements outlined in said letters were approved.

Respecfully submitted,

J. Morgan Stevens,
J. R. Buchanan.

BUCHANAN & MONTGOMERY
Attorneys-at-Law
215 First National Bank Building
Laurel, Mississippi

July 22, 1947.

J. R. Buchanan
Goode Montgomery, Jr.

Hon. Ben F. Cameron
Cameron & Wills
Attorneys at Law
Jackson, Mississippi

Inre: N. L. Hudson et al. vs. Gulf Refining Co. et al.,
No. 36,406

DEAR MR. CAMERON:

I have read the letter of Green & Green, addressed to you, under date of July 18, 1947, listing the matters to be stipulated on your proposed motion for certiorari.

I approve all of the suggestions made by Green & Green, but would suggest that there should also be added the following two paragraphs:

"That all of the defendants, including those who did not file cross-bills, appeared at the Special May, 1946, term of Court, represented by counsel and actively participated in the hearing of the cause No. 398 on the merits.

"That the defendants, Paul Ellis Newell and Claudies Newell, on whose behalf there had been theretofore filed motions to stay proceedings under the Soldiers and Sailors Civil Relief Act, appeared at the January, 1946, term of Court in said cause, by their attorneys, and announced ready for trial, and requested that the Court proceed with the trial of said cause on its merits; that no decree was entered by the Court on said motion and filed on behalf of the said defendants, Claudies Newell and Paul Ellis Newell."

I must also insist that the answer of George J. Leiderman be copied in the Record in full, together with the answers

of the other defendants. I do not think that a stipulation would be complete unless it includes all of the pleadings filed by all of the parties. I will be willing to sign the stipulation, provided it includes the items set forth in the original proposed stipulation offered by you, with the changes suggested by Messrs. Green & Green and Mr. R. E. Wilbourn, and the changes suggested in this letter.

With best wishes, I am

Sincerely yours,

(S.) J. R. BUCHANAN.

JRB:ebg.

cc. Stevens & Cannada; Wells, Wells, Newman & Thomas; Green & Green, Irvin W. Coleman, R. E. Wilbourn, Welch, Cooper & Welch.

STEVENS AND CANNADA
Attorneys and Counsellors at Law
623-25 Standard Life Building
Jackson, Mississippi

July 23, 1947.

MR. BEN F. CAMERON, Attorney at Law
c/o Cameron and Wills
Meridian, Mississippi

DEAR MR. CAMERON:

Re: N. L. Hudson, et al. vs. Gulf Refining Company, et al.
No. 36,406

Reference is made to your communication of June 13, 1947, addressed to all counsel, proposing stipulation covering the record to the Supreme Court of the United States, and reference is, also, made to the letter of Green and Green to you under date of July 18, 1947, and to the letter of my associate, Mr. J. R. Buchanan, to you of July 22, 1947. With the exception of one further addition to the Transcript, subsequently noted, I approve the statement and

conclusion of Mr. J. R. Buchanan in his letter to you of the 22nd, with this possible exception.

If you expect to undertake to predicate error on account of the Soldiers and Sailors Civil Relief Act, and if you expect to bring forward the point which you left-handedly stated at the top of Page 8 of your recent affidavit and resistance to our motion for summary judgment in the Federal Court proceeding to the effect that some of the defendants suggested to the state court that Thomas Melvin Lewis was claimed by some of the defendants to be serving in the armed forces of the United States beyond the continental limits of the United States of America and claiming rights based under the Soldiers and Sailors Civil Relief Act of 1940, then we would like to have you stipulate in addition to the paragraph dictated by Mr. Buchanan with reference to the Newells, the following:

> "Thomas Melvin Lewis, at one time a member of the armed forces of the United States, was discharged from the Army and filed his separate answer herein, and furthermore, was appointed guardian of the minor defendants of the Lewis family, and filed a supplemental answer on behalf of said minors prior to the filing of the motion to dismiss, and joined his co-defendants in filing objections to the dismissal of the case and insisting upon a trial thereof on the merits."

If you do not expect to predicate error on this point than it would be useless to add the foregoing stipulation. As I stated to you personally at Gulfport recently, it is difficult to stipulate the record when we do not yet know what your proposed assignments of error are or will be.

With kind regards,

Yours very truly,

STEVENS AND CANNADA,
By —— ——,

JMS/mes.

cc: Mr. J. R. Buchanan, Messrs. Green and Green, Messrs. Wells, Wells, Newman and Thomas, Mr. A. S. Scott, Mr. Irwin W. Coleman, Mr. R. E. Wilbourn, Messrs. Welch, Cooper and Welch.

P. S.—We are requested by Major Wells, for his firm, to state that he approves the foregoing letter, so far as his clients are concerned.

FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 8 1947
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 262

N. L. HUDSON, ET AL.,
Petitioners,

vs.

GULF REFINING COMPANY, ET AL.,
Respondents.

RESPONSE TO THE PETITION FOR CERTIORARI AND SUPPORTING BRIEF THEREON

J. MORGAN STEVENS,
Jackson, Mississippi;
ELLIS B. COOPER,
Laurel, Mississippi,
Attorneys for Respondents.

J. R. BUCHANAN,
A. S. SCOTT,
BEARD AND PACK,
Laurel, Mississippi;
STEVENS AND CANNADA,
Jackson, Mississippi,
Of Counsel.

INDEX

Subject Index

	Page
I. Parties to the litigation	1
II. Opinion below	2
III. Statement of the matter involved	2
IV. Questions involved	22
V. Brief and argument	26
1. The Motion to Dismiss Without Prejudice Was Properly Overruled Under State Policy and Procedure	26
2. No Violation of the Due Process Clause of the Federal Constitution	27
3. No Violation, Article III, Sec. II, Paragraph 1; Petitioners Had No Constitutional Right to Litigate in the Federal Court, and Even If They Had They Waived That Right By Submitting Their Cause Voluntarily to the State Court	31
4. The Federal Court Had No Jurisdiction Because of the Pendency of This State Court Action	32
5. A State Court's Decision Based Upon a Non-Federal Ground Will Not Be Reviewed by This Court, Even Though There Were Errors in Administering a State Statute	42
6. Additional Response to Assignments Argued by Petitioners in Their Printed Brief	44
A. Counsels' Argument II, Page 49	44
B. Calling a Special Term and Forcing Petitioners to go to Trial in the Face of "Threats and Armed Guards"	45
C. Counsels' Argument III, Page 56; In Proceeding to Judgment Against Petitioners On an Ex Parte Hearing at a Time When the Case Was Not Triable Because of the Absence of Necessary Parties	46

Page

D. Counsels' Argument IV, Page 58; In Proceeding to a Trial on the Merits When Mississippi Practice Permitted Only Dismissal With Prejudice, After Petitioners Declined to Proceed Further.. 47
E. Counsels' Arguments V-X, Inclusive, Page 60, Et Seq. 47
VI. Conclusion 48

CASES CITED

Adams v. *Commercial Co.*, 113 Miss. 608, 74 So. 435.. 26
American Land Co. v. *Zeiss*, 219 U. S. 47, 55 L. Ed. 82 29
Andrews v. *Swartz*, 156 U. S. 272, 39 L. Ed. 422..... 45
Angel v. *Bullington*, 91 L. Ed. 557..... 48
Appleby v. *Buffalo*, 221 U. S. 524, 55 L. Ed. 838..... 29
Bell Teleph. Co. v. *Pennsylvania Pub. Utility Commrs.*, 309 U. S. 30, 60 Sup. Ct. 411, 84 L. Ed. 563 30
Bonner v. *Gorman*, 213 U. S. 86, 53 L. Ed. 709..... 29
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673, 50 Sup. Ct. 451, 74 L. Ed. 1107..... 30
C. & A. R. R. Co. v. *Union Rolling Mill Co.*, 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081..... 26
Calcote v. *Texas Pac. Coal and Oil Co.*, 157 F. (2d) 126, Certiorari Denied, 91 L. Ed. 80..... 42
Caldwell v. *Texas*, 137 U. S. 692, 34 L. Ed. 816..... 28
Central Land Co. v. *Laidley*, 159 U. S. 103, 40 L. Ed. 91 29
Chicago & Alton R. R. Co. v. *Union Rolling Mill Co.*, 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081..... 16
Chicago, etc., R. R. Co. v. *Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979..... 31
Converse, In Re, 137 U. S. 624, 34 L. Ed. 796..... 28
Cooper v. *Lewis*, 2 Phill. Chan. 181..... 26
Crowell v. *Randall*, 10 Pet. 368, 9 L. Ed. 458..... 25
Empire Trust Company v. *Brooks*, 232 Fed. 641.... 33
Erie R. R. Co. v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487..... 43
Farmers' Loan & Trust Company v. *Lake Street Elevated R. Co.*, 177 U. S. 51, 44 L. Ed. 667, 20 Sup. Ct. 564 38

Page

Flournoy v. *Wiener*, 321 U. S. 253, 64 Sup. Ct. 548, 88 L. Ed. 708 31

Harkin v. *Brundage*, 276 U. S. 36, 72 L. Ed. 457, 48 Sup. Ct. 268 38

Heck v. *Nicholas*, 6 F. (2d) 10 49

Herb v. *Pitcairn*, 324 U. S. 117, 65 Sup. Ct. 459, 89 L. Ed. 789 30

Hibben v. *Smith*, 191 U. S. 311, 48 L. Ed. 195 31

Holley v. *Lawrence*, 318 U. S. 518, 63 Sup. Ct. 394, 87 L. Ed. 434 30

Honeyman v. *Haman*, 300 U. S. 14, 81 L. Ed. 476 43

Iowa, etc., R. Co. v. *Iowa*, 160 U. S. 389, 40 L. Ed. 467 28

Kentucky Union Co. v. *Kentucky*, 219 U. S. 140, 55 L. Ed. 137 29

Kline v. *Burke Construction Co.*, 260 U. S. 226, 67 L. Ed. 226, 43 Sup. Ct. 79, 24 A. L. R. 1077 35

Leeper v. *Texas*, 130 U. S. 462, 35 L. Ed. 225 28

Lent v. *Tillson*, 140 U. S. 317, 35 L. Ed. 419 42

Lowry v. *Silver City Gold and S. Min. Co.*, 179 U. S. 196, 45 L. Ed. 151, 21 Sup. Ct. 104 13

Marchant v. *Pennsylvania R. Co.*, 153 U. S. 380, 38 L. Ed. 751 28

Marrow v. *Brinkley*, 129 U. S. 179, 32 L. Ed. 654 29

Millsaps v. *Bond*, 64 Miss. 453, 1 So. 506 26

Minnesota v. *National Tea Co.*, 309 U. S. 551, 60 Sup. Ct. 676, 84 L. Ed. 920 29

Mitchell v. *Film Transit Co.*, 13 So. (2d) 154, 194 Miss. 550 ..... 12, 26

Neblett v. *Carpenter*, 305 U. S. 297, 59 Sup. Ct. 170, 83 L. Ed. 182 30

Northern v. *Scruggs*, 118 Miss. 363, 79 So. 227 26

Ong Chang Wing v. *United States*, 218 U. S. 272, 54 L. Ed. 1040 29

Pacific, etc., Co. v. *Lewis*, 241 U. S. 440, 60 L. Ed. 1084, 36 Sup. Ct. 637 38

Penn. Gen. Casualty Co. v. *Pennsylvania*, 294 U. S. 189, 79 L. Ed. 850 41

Peoples Bank v. *Pennington*, 137 Miss. 653, 102 So. 386, Suggestion of Error, 103 So. 144 26

Page

Powers v. *Blue Grass Building and Loan Association*, 86 Fed. 705 33
President, etc., of Bowdoin College v. *Merritt*, 59 Fed. 6 36
Pullman Palace Car Co. v. *Central Transp. Co.*, 171 U. S. 138, 43 L. Ed. 108, 18 Sup. Ct. 808 ..... 15, 16, 26
Radio Station WOW v. *Johnson*, 326 U. S. 120, 65 Sup. Ct. 1475, 89 L. Ed. 2092 30
Rogers v. *Peck*, 199 U. S. 425, 50 L. Ed. 256 28
Shivers v. *R. R.* (C. C.), 4 Fed. 97 26
Standard Oil Co. of California v. *Johnson*, 316 U. S. 481, 86 L. Ed. 1116 43
State v. *Hemmingway*, 69 Miss. 491, 10 So. 576 26
Stirling v. *Seattle, etc., Rwy.*, 198 Fed. 913 37
Westfeldt v. *N. C. Mining Co.*, 166 Fed. 706 38

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American Jurisprudence, Volume 36, Section 47 13
Annotations:
84 L. Ed. 925 31
63 L. R. A. 572 31
Gibson, Suits in Chancery 15
Griffith, Mississippi Chancery Practice:
Sections 534, 535 26
Section 682 45
Section 686 45
Mississippi Code of 1942:
Section 755 6
Section 1659 9
Moore's Federal Practice, Volume 3, 1946 Supplement, Page 48 31
Restatement of the Law, Conflict of Laws:
Section 48 25
Section 83 25

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 262

N. L. HUDSON, ET AL.,

Petitioners,

vs.

GULF REFINING COMPANY, ET AL.,

Respondents.

RESPONSE TO THE PETITION FOR CERTIORARI AND SUPPORTING BRIEF THEREON

I

Parties to the Litigation

Petitioners for Certiorari were the Complainants in the State Court action filed by them in the Chancery Court of the First Judicial District of Jasper County, Mississippi, and from an adverse decision in said Court were Appellants in the Supreme Court of Mississippi.

The Respondents are all parties owning or having any interest in the litigation involved in the suit and Defendants to said State Court action.

This response is on behalf of Talmadge D. Lewis and Annie Lewis, his wife, and their eight children, four of

whom are minors represented herein by their Guardian, Thomas Melvin Lewis; Cora B. Myers Bradford, individually and as Guardian for her children, Clifton Myers, Simon Myers, and James Myers, minors; Mason Newell, individually and as Guardian for Alfonso Newell, Juanita Newell, and Mason Newell, Jr., minors; Claudius Newell; Paul Ellis Newell; George J. Leiderman; T. B. Corley; Carrie Kelly Husband and her husband, Norman Husband; Jettie Kelly Windham and her husband, George Windham; Marjorie Jones and her husband, Ab Jones; and Mrs. Mamie M. Abney; all of whom, with others, were parties defendant in the State Court and Appellees in the Supreme Court of Mississippi.

II

Opinion Below

The report of the Opinion of the Supreme Court of Mississippi is accurately stated by Counsel for Petitioners at Page 3 of their Petition for Certiorari and Brief in Support Thereof, and is copied in full by them, Appendix Page 82.

III

Statement of the Matter Involved

The Respondents believe that a full and fair statement of the issue presented in the State Court, and the decision of the State Court is all that is required to demonstrate that this Court should not grant certiorari.

On June 10, 1944, the lands involved in this suit were in the possession of and occupied by several families, both white and colored, including chiefly the Respondents, Talmadge Lewis and Annie Lewis, his wife, and eight children; Mason Newell and members of his family; Jettie Kelly Windham and George Windham; Carrie K. Husband and

Norman Husband, her husband, and members of their family; P. R. Bethea and wife; Cora B. Bradford and Clifton Myers, having so occupied for long periods of time under full claim and color of title, as shown by the record in this case.

A few days prior to June 10, 1944, aforesaid, oil was discovered on the land, and the T. D. Lewis Unit No. One was brought in as a producer. On said June 10, 1944, Petitioners herein, as Complainants, filed their Bill of Complaint in the Chancery Court of the First Judicial District of Jasper County, Mississippi in Cause No. 398, wherein and whereby they sought as against all of the record owners and claimants, to obtain the following alleged equitable relief:

They alleged that the lands at one time belonged to their ancestor, N. L. Hudson, and that said N. L. Hudson in his life time, sometime in the year 1878 or 1879, conveyed the lands to his wife, Mrs. M. E. Hudson, for and during the time of her natural life, and at her death to the children of N. L. Hudson for life, and at their death the remainder to the children of the said children (R. 7-8); and "that the original of this deed has been lost, destroyed or misplaced and cannot be found after diligent search and inquiry but complainants allege on information and belief that the defendants hereinbefore named, or some of them, have either the original or a copy of said instrument in their possession." Also, that N. L. Hudson executed and delivered a warranty deed to his wife in the year 1880 for and during the term of her natural life and at her death to the heirs of his body, and that this deed was filed for record and recorded, but that the record of the said last named deed was destroyed "when the Court House burned at Paulding, Mississippi on September 10, 1932 and that said deed has not been refiled," and complainants attached as an exhibit an alleged substantial copy of the deed; that N. L. Hudson

departed this life intestate on the 26th day of January, 1895 while residing on the land, leaving the alleged surviving heirs of his body as named in paragraph 8 of said bill.

The Bill then details certain conveyances executed by Mrs. M. E. Hudson, one in August, 1897 and one in 1899, but claimed that the conveyances, while absolute in form, had the legal effect of conveying only the alleged life estate of Mrs. Hudson, and that all subsequent grantees in the chain of title acquired only a life estate. The theory of the Bill is that all who acquired title through Mrs. Hudson acquired only her life estate, and at the death of Mrs. Hudson in 1928 became tenants at sufferance.

The Bill charges that the Respondent, Gulf Refining Company, had a mineral lease from some of the defendants, and had brought in a valuable oil well on one 40 acres of the land, and that the Gulf Refining Company, hereafter for brevity referred to as the Gulf, completed a well on or about May 20th, 1944, and is wrongfully claiming seven-eighths of the minerals, under its lease, and that the Complainants are entitled to a temporary injunction, "enjoining and restraining the said Gulf Refining Company from paying out any part of the royalty under the said land to any of the defendants, or from converting to their own use any part of the seven-eighths of the said oil, gas and other minerals produced from said land." It is also charged that one acre of the land was embraced in the forty acres upon which the oil well known as the Lewis-Morrison Well was completed as a second producer of the Gulf, and that the Gulf "is depleting and drawing oil from the said one acre of land, and that they became, were and are liable to complainants for their prorata value for all of said oil heretofore produced, or to be produced from the said well, pending the final determination of this lawsuit" (R. 66-67).

Let it be stated here that the only full and complete copy of the transcript served on us is a typewritten copy, filed

pending motion by Petitioners to be relieved from the requirements of the Rules, and therefore it becomes necessary for us to refer to the typewritten pages of the record if we at all comply with the requirements to respond within twenty days. Not waiving, therefore, any of the requirements of the Rules, or conceding that the Petitioners have the right to present their petition without complying with the Rules, we proceed to do the best we can with the record before us, discharging our duty to the Respondents.

The prayer of the bill in the state courts was for an accounting for the oil that had been produced or sold from the wells; for a decree for all of said oil, or the value of all of said oil; that the lands "will be decreed to be the property of complainants, together with all oil produced therefrom"; that from time to time "as the equities of the case may require, temporary injunctions and restraining orders or other process to protect the rights of all parties hereto pending the final determination of this cause" shall issue; and that "upon final hearing that this court will grant writs of possession, where necessary, to put the complainants in possession of all or any part of the said land" (R. 68); also, that the Court "will adjudge and decree that the complainants are the owners in fee simple of the lands * * * and that this Court will cancel all of the instruments insofar as the same purport to attempt to convey any part of said lands or any interest therein" (R. 67).

The Bill shows further that it is an equitable proceeding to establish an alleged lost instrument, a deed or deeds, upon which the alleged title of the Petitioners rest; to remove clouds from the alleged title of the Petitioners; for a decree adjudging the complainants to be the true owners in fee of the lands and the minerals; for an accounting for all minerals produced or to be produced pending litigation, and for ultimate possession, through the process of the court, if necessary and proper, canceling all the title deeds

upon which the defendants, the Respondents herein, claim as alleged clouds upon the alleged title of the Petitioners.

Under this Bill, Lis Pendens Notice thereof was recorded, as expressly provided for by Section 755, Mississippi Code of 1942. This statute reads as follows:

> "When any person shall begin a suit in any court, whether by declaration or bill, or by cross-complaint, to enforce a lien upon, right to, or interest in, any real estate, unless the claim be founded upon an instrument which is recorded, or upon a judgment duly enrolled, in the county in which the real estate is situated, such person shall file with the Clerk of the Chancery Court of each county where the real estate, or any part thereof, is situated, a notice containing the names of all the parties to the suit, a description of the real estate, and a brief statement of the nature of the lien, right, or interest sought to be enforced. The Clerk shall immediately file and record the notice in the lis pendens, record and note on it and in the record, the hour and day of filing and recording."

The effect of this lis pendens notice was to make it impossible for any of the landowners or lessors in the mineral leases to realize upon the royalties due them under the terms and provisions of their leases, or to negotiate sales of mineral interests pending the litigation.

Answers were filed by all of the defendants, and by their answers Respondents, as defendants in the state court, set forth the title deeds under which they claimed ownership, plead gross laches on the part of the complainants, and estoppel to lay claim or assert a claim based upon the alleged deed charged to have been executed way back in 1878 or 1879; plead also, and relied upon title by adverse possession.

The mineral lessees, the Gulf and the Tidewater Associated Oil Company concluded that by virtue of the unusual averments of the bill, the purpose of which was to place all

of the present owners and lessors of mineral rights in the status of tenants at sufferance, they could not continue to spend thousands upon thousands of dollars to develop this producing oil area, as they were obligated to do under and by virtue of the terms of the mineral leases taken from these respondents, without exposing themselves to the hazards of losing every dollar thereafter invested. In this situation these companies decided to purchase protection as indemnity against any such ultimate heavy losses, and accordingly negotiated for so-called protective leases. The Gulf took a so-called protective lease from the Hudsons, dated December 15, 1944, paying therefor the tremendous price of Fifty Thousand Dollars ($50,000) cash. The Tidewater, likewise, took a protective lease dated May 18, 1945, paying therefor Six Thousand Dollars ($6,000) in cash.

Section 14 of the Gulf protective lease reads as follows:

> "It is understood and agreed notwithstanding any provision of this instrument apparently to the contrary that Lessee does not in any way admit that Lessors, or any of them, have any right, title or interest in or to the lands, or any of them, covered hereby, or to any of the oil, gas and other minerals in and under or that may be produced therefrom (unless and until Lessor establishes some title to or interest therein either by compromise settlement or final decree in the suit entitled N. L. Hudson, Et Al., Complainants, Versus The Gulf Refining Company, Et Al., Defendants, No. 398, Chancery Court for the First Judicial District, Jasper County, Mississippi), but on the contrary Lessee claims and asserts that it has good and valid title to all of the oil, gas, and other minerals in and under and that may be produced from the land described in this lease by virtue of oil, gas and mineral leases heretofore executed by T. D. Lewis and Annie Lewis, recorded in Oil Lease Book 2, Page 39; by Jettie Windham, G. R. Windham, Carrie Husband and Norman Husband, recorded in Oil Lease Book 2, Page 251; by Margiree Jones and Abb Jones, recorded in Oil Lease Book 2, Page 213; and by

Mason Newell, recorded in Oil and Gas Book 6, Pages 547-548, all references are to the records of the First Judicial District of Jasper County, Mississippi.

"It is further expressly agreed that Lessee has accepted and does accept this lease from Lessor not in recognition of the title or claim asserted by Lessor, but it has accepted and does accept this lease solely for the purpose of buying its protection to the title, or titles to the land covered hereby together with all the oil, gas and other minerals thereunder, or that may be or have been produced from said land under the terms of the herein above mentioned leases; and Lessee shall never be called upon to recede from its position that it now has and owns valid mineral leases covering all of said land; and it shall be just as free hereafter as it has been heretofore to assert that its Lessors named in this paragraph have and had good and valid title to the whole of the lands covered hereby, and to all of the oil, gas and other minerals thereunder at the respective date of execution of said leases; and, it is further agreed that the continued assertion of such contention by Lessee shall in no manner be deemed or construed a repudiation of the terms of this lease.

"And, further, notwithstanding any provisions of this lease apparently to the contrary, it is agreed and understood that Lessor shall not be entitled to and Lessee shall be under no obligation to pay to Lessor any of the royalty, or any part thereof, provided for herein unless and until in the suit entitled N. L. Hudson, et al., Complainants *vs.* The Gulf Refining Company, et al., Defendants, No. 398, Chancery Court for the First Judicial District, Jasper County, Mississippi, Lessor shall have established by a compromise settlement between the parties thereto, or by final decree of the court therein, that the Lessor herein is the owner of the lands and minerals hereby leased and involved in said suit or the owner of an interest therein."

A similar provision was incorporated in the Tidewater Lease in paragraph 12. These leases are reflected in the record at pages 614 and 628.

There were very important proceedings in the state court. Searching interrogatories were propounded, by authority of state law, to the Gulf, Mason Newell and George J. Leiderman. By these interrogatories the named defendants were required to file copies of their title deeds and all substantial facts with reference to their ownership. Their consciences were searched as to abstracts of title and title deeds, inquiry was made as to royalty checks, especially those to respondent, T. D. Lewis. All of those interrogatories were answered and became a part of the record. Not content with the information thereby derived through interrogatories, Complainants invoked the powers of the state court, under the provision of Section 1659 of the Mississippi Code of 1942, to inspect title deeds, abstracts, documents, etc. This statute reads as follows:

> "The court in which any action or suit is pending may, on good cause shown, and after notice of the application to the opposite party, order either party to give to the other, within a specified time, and on such terms as may be imposed, an inspection and copy, or permission to take a copy, of any books, papers, or documents in his possession or under his control containing evidence relating to the merits of the action or proceeding or of the defense thereto; and if compliance with such order be refused, such books, papers or documents shall not be given in evidence in the action or proceeding by the party so refusing; and the court may punish the recusant party for a contempt of court; and if a complainant, or plaintiff, fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of non-suit or dismissal; and if a defendant fails to comply with such order, the court may, on motion, give judgment or decree against him by default or confession."

Separate motions were made by the complainants against the principal defendants, including the two major oil com-

panies, for an order to inspect books and records. Among other things charged in the motion invoking the process of the court under this statute was the following:

> "That by reason of lapse of time and the destruction of the land records of the First District of Jasper County, Mississippi, in September, 1932, it is difficult to make the necessary proof to establish the truth of the averments of the respective parties to this suit and of the merits of the case, and that the truth can be established from the said books, records and documents in the possession and files of the said defendant, or under its control; and that a large amount of time in the trial of the case, as well as expense, will be saved if the complainants are vouchsafed the right given them by statute of inspecting the said books, records and documents and papers in the possession or under the control of the said defendant, containing evidence relating to the merits of complainants' action and of the defenses interposed thereto; * * *".

The motions were sworn to and set down for hearing in vacation of the Court, in Meridian, Mississippi, on March 15, 1945 (R. 521). A hearing was had, and testimony taken before the presiding Judge, and after a full hearing a decree was entered granting the motions in part and overruling them in other parts (R. 455-456).

By this decree, Respondent, Talmadge D. Lewis, was required to place in the hands of his attorney, for the inspection of Petitioners, all the original deeds, or conveyances describing any of the land involved in the suit and dated prior to September 10, 1932, the date the court house and records of Jasper County, Mississippi burned. Thirty days was allowed to inspect and take photostatic copies. A like order was made as to other defendants. Particular attention was directed to an important abstract of title made and certified by J. Madison Travis, Esq., prior to the burning of the court house. This abstract happened

to be in the possession of J. R. Buchanan, attorney for the defendant, and respondent, Mason Newell. It was made by Mr. Travis on or about January 6, 1922, and listed, among other conveyances, a deed from N. L. Hudson to Mary Hudson, his wife, dated January 23, 1880, and duly filed for record, and full right of inspection of said abstract and to take photostatic copy was awarded.

In the application for the right to inspect, Petitioners, as Complainants, charged on information, that the defendants had the original or a true copy of the conveyance relied upon by them, whereby, as alleged, Mrs. Mary E. Hudson acquired only a life estate. The defendants answered this motion and denied, under oath, having any knowledge of any such conveyance. The information and sworn denials had probative value on the merits of the litigation, and are important in considering whether the complainants had, as alleged, the unqualified right to dismiss their bill without prejudice. They went on a fishing expedition and got a water-haul! By this method of discovery it developed that no such deed was in the possession of any of the defendants, and furthermore, that there was an authentic abstract of title, made before the court house burned, and filed for record after the court house was destroyed by fire, as a part of the public records of the county, showing that N. L. Hudson made a deed absolute to his wife, whereby she had the right to sell and convey to the predecessors in title to the respondents.

The Petitioners invoked the writ of discovery to prove their case in the state court, and instead of proving their case brought to light dependable records which disproved their case and entitled the defendants to a decree on the merits. This fact is important when we bear in mind the Missisippi rule of law, hereinafter discussed, that in equity "When a case has proceeded to such a point, or when such steps have been taken that defendant has secured some sub-

stantial right, which would be destroyed by dismissal, it should not be permitted." *Mitchell* vs. *Film Transit Co.*, 194 Miss. 550, 13 So. 2d 154, the latest expresion of our Supreme Court on the subject.

After the case had been at issue on the voluminous pleadings, and after Gulf had made its answer a cross-bill, sought confirmation of its mineral leases as against the original complainant, and after the so-called Ridgeway Group had made their answer a cross-bill, and sought confirmation of their deed to mineral rights, and after this case had been pending from June 10, 1944 to on or about December 15, 1945, the Complainants filed a motion for a voluntary dismissal, which was successfully resisted by Respondents. Some of the original defendants filed written objections to the motion to dismiss, while others appeared and objected without answer in writing. The court took the motion under advisement, showing mature deliberation on his part. Among the grounds of objection, as shown by the written answers, were the contentions that this case had proceeded to that point where it would be prejudicial to the rights of the defendants to permit a dismissal.

Petitioners had voluntarily submitted themselves to the jurisdiction of the state court. They invoked that jurisdiction, and through lis pendens prevented Respondents from disposing of their valuable mineral rights, and from realizing on their royalties. It was affirmatively shown by evidence taken on the motion to dismiss that not a dime of royalty had been paid because of this law suit. That is the situation to-day and that is one reason we are resisting this wrongful application for certiorari.

A further ground of objection was based upon the provision of the so-called protective leases, in which, for a valuable consideration, Petitioners agreed that they would not be entitled to any royalties until, and unless, in that very case then pending on the Docket of the Jasper County Chan-

cery Court, and Numbered 398, it should be adjudicated that they owned the lands, or had some interest therein. We contended then and still contend that that agreement enured to the benefit of the privies of the mineral lessees, to-wit, the Gulf and the Tidewater, especially when we remember that the relationship between the lessor and the lessee in a mining lease is so intimate that ordinarily the lessor cannot acquire or assert an adverse title. 36 Am. Jur., Mines and Mining, Section 47; citing *Lowry* v. *Silver City Gold and S. Min. Co.*, 179 U. S. 196, 45 L. Ed. 151, 21 Sup. Ct. 104.

A further objection to the dismissal was the pendency of the cross-bill. Counsel for Petitioners do not and cannot argue that the original complainant in an equity suit can take a voluntary dismissal when there is an appropriate cross-bill seeking affirmative relief. We also contended before the Learned Chancellor that the complainants had been guilty of gross laches in asserting a stale claim. Upon their own theory of their bill they allege that upon the death of the alleged life tenant, Mrs. Hudson, they became absolute owners with the right of possession. The pleadings and the proof show that Mrs. Hudson died in 1928, approximately 16 years prior to the filing of the original bill, during all of which time Respondents were in possession, claiming full ownership and possession, and Petitioners did not make inquiry, pay taxes, or take any interest in the lands involved in this controversy until a valuable oil field had been developed thereon. In the meantime, witnesses having knowledge of the title and possession had died, the public records of the county had been destroyed and no effort was made by Petitioners, as alleged claimants, to avail themselves of the statutory remedy to have the title deeds refiled and re-recorded.

It was further contended that they were estopped by their agreement in the protective leases, whereby they agreed that the Chancery Court of the First Judicial District of

Jasper County, Mississippi in this very case, No. 398 on the Docket thereof, should be the final judge as to whether they were entitled to recover any royalties, and their right to recover royalties was expressly conditioned upon their obtaining an adjudication that they were the owners of the land, or some part thereof. They repudiated this agreement in their futile attempt to withdraw from the state court.

Learned Counsel have argued that their clients made a settlement with the mineral Lessees. It is true that they frightened the Lessees into the payment of large sums for protection, and this without the knowledge or consent of the real land owners, but the so-called settlement was in effect an agreement to submit to the state courts the decision of the rights of all parties.

When the State Court overruled the motion to dismiss without prejudice there was an effort to appeal to the Supreme Court of Mississippi by applying to Mr. Justice Griffith, Presiding Judge of Division B of the Supreme Court. The informal application was resisted, the right to appeal contested, oral arguments thereon presented, and memorandum of authorities supplied. Upon consideration the application was overruled by a memorandum in letter form, reading as follows:

"February 8, 1946.

"Mr. Ben Cameron, Meridian, Mississippi; Mr. J. R. Buchanan, Laurel, Mississippi; Messrs. Stevens & Stevens, Jackson, Mississippi.

GENTLEMEN:

Re: Application for Interlocutory Appeal in HUDSON v. GULF REFINING Co., Jasper County

"This matter was discussed with my associates yesterday afternoon, and it was the majority opinion, tentative of course, that, (1) The Chancellor was probably right in refusing the dismissal, and, (2) that the

appeal would be solely as regards the adjective law not allowable under the interlocutory appeals statute. Acting on that advice the application is denied.

"The papers left with me are rather voluminous. For that reason I would suggest that your respective associates here in Jackson call for them. Also that those of you addressed above notify all the other attorneys concerned.

Yours very truly,

V. A. GRIFFITH."

It will be observed that Judge Griffith took counsel with his associates and tentatively reached the conclusion then that the Learned Chancellor "was probably right in refusing the dismissal," and thereby Petitioners were warned in advance as to the final outcome on their contention that they had an unqualified statutory right to dismiss. The refusal to dismiss is supported by numerous cases hereinafter referred to, from Mississippi and other jurisdictions, all holding that the complainant in an equity case does not have, in all cases, the right to dismiss, but, on the contrary, where there has been any proceeding in the case, which has given the defendant any right against the complainant, the complainant cannot dismiss his case, as of course; or, as stated otherwise, when the defendant has secured some right by the filing of the bill, which would be destroyed by the dismissal of the bill. And, furthermore, there can be no voluntary dismissal of the original bill when there is a cross-bill or cross-demand. This set policy, as an important procedural matter, is rooted and grounded in all leading text books on equity pleading and practice, such as Mr. Daniel, Mr. Fletcher and other works on equity pleading and practice, and by Gibson in his *Suits in Chancery*, and by Judge Griffith of the Mississippi Supreme Court, in his oft-quoted work on Mississippi Chancery Practice, and proclaimed by the Lord Chancellor of England in *Cooper* v. *Lewis*, 2 Phill. Chan. 181; by this Honorable Court in *Pull-*

man Palace Car Company v. *Central Transportation Co.*, 171 U. S. 138, 43 L. Ed. 108; *Chicago & Alton R. R. Co.* v. *Union Rolling Mill Co.*, 109 U. S. 702, 3 S. Ct. 594, 27 L. Ed. 1081, and other like cases decided by this, and inferior federal courts and by state courts.

No better statement of the general rule is to be found than that announced by this Honorable Court in *Pullman Palace Car Co.* v. *Central Transpor. Co., supra.* The rule applies generally irrespective of whether the complainants are residents or non-residents; and the fact that the original complainants in this case were non-residents had not a whit to do with the decision of the Learned Chancellor in overruling the motion to dismiss.

This cause was triable at the January 1946 term of court, when the complainants presented their application to dismiss. They obtained wrongfully a continuance, due to the circumstances that the judge desired more maturely to consider the matter before acting thereon. Later, a special term was called, as by law authorized. Counsel are in error in conveying the impression that the Learned Chancellor called a special term to try this one case. It was called to try any and all cases on the docket of the court that were then triable, but the Learned Judge, as a special courtesy to counsel, specially notified all counsel that this case would be tried, and this by means of a confidential letter, in which a so-called threat was commented upon. The fact is that the docket of the Chancery Court of Jasper County, as well as the docket of the Chancery Courts of many counties where oil had been discovered in Mississippi had become congested by litigation growing out of this development, so much so that it led the Legislature of 1946 to create two new additional Chancery Court Districts to relieve this congestion.

We must respectfully take issue with Learned Counsel in several statements made in their supporting brief and

argument, and some implications conveyed by their statements.

Counsel contend that because of alleged threats they could not fairly present their case to the state court of Jasper County. The first mention of threats in this law suit was in the confidential letter of Judge Neville, addressed to all counsel, wherein the Learned Judge stated that it had come to his knowledge that certain parties interested in the case had made threats against certain witnesses, litigants and attorneys, but the Judge was careful to state "Of course, I have no personal knowledge that any such threats have been made, but it is my duty, as I see it, to see that all officers of the court, litigants and witnesses are protected." The Learned Chancellor acted upon information conveyed to him, and the purpose of his action was to guarantee to the complainants and their attorneys a fair trial. Let it be remembered that the presiding judge of an equity court in Mississippi is both judge and jury. Here we have a judge, as a judge, and a judge, as a jury, giving assurance of a fair trial.

The letter aforesaid was written by the Judge in vacation of the court, and this unusual charge about threats was never brought to the attention of the court while sitting as such, was not assigned by Learned Counsel for petitioners as any reason for dismissal, was never inquired into by the court at any of the many terms thereof, from the filing of the bill to the final trial thereof, and is based upon no evidence or affidavits of anyone, and does not in any wise intimate which, if any, of the multitude of the defendants could have made such wrongful statements. There is nothing in any pleading in this case with reference thereto, and the court was never called upon, as a court, to make any ruling in reference thereto. Furthermore, when the special term was called there was not, within our knowledge, any armed guard, and no one was searched in entering and

departing from the little court house. There was no evidence of any firearms of any kind, and no evidence of *any* untoward event, but, on the contrary, the trial of this case was as peaceful as the beautiful May day in which it was heard.

There is no basis whatsoever for the statement that petitioners desired to withdraw to "avoid threats and trial under armed guards," as stated in their summary of questions presented, page 15; paragraph F, page 19, and elsewhere in the petition for certiorari, and supporting brief thereon. There is no foundation for the statement, and specifications of errors, that they were required to submit to search, and to go to trial in an atmosphere of threats and intimidation. The only thing that this extravagant statement of counsel can be based upon is the letter from the Judge, and even in that the Judge does not say that he had ordered armed guards, but simply that he had requested the sheriff to exercise his statutory right to have twelve deputies present. No courts, either the circuit or chancery courts of Mississippi, are held in the absence of the sheriff, or his lawful deputies, and it is not infrequent to have a number of bailiffs to wait upon the court, and the mere presence of a number of bailiffs would be no evidence that a party to this litigation had overstepped the bounds in making any threats. It is an easy matter to make charges, and the whole argument of counsel is a lame effort to suggest some sensible reason for desiring to withdraw from the court, to which the petitioners had voluntarily submitted their case, and the court which in our judgment is the only court which had full jurisdiction of the subject matter and all of the parties. We submit that the letter from Judge Neville is no lawful part of the pleadings and proceedings in this case. It is a letter written by a judge in vacation of the court and is a confidential message to all counsel. Since Learned Counsel have, as we believe, stepped

out of the record to base their right to dismiss upon alleged threats, we feel that in justice to Respondents and to ourselves, as officers of the Court, and in justice to the state court, we are justified in directing the Court's attention to certain admitted facts which demonstrate that the motion to dismiss was not on account of alleged threats.

The motion to dismiss is dated December 12, 1945, (R. 605), and was not heard until the following January. The motion was overruled by the Learned Chancellor on January 18, 1946, (R. 721). Up to that time no reference to threats had been made by anybody. The letter from Judge Neville was dated March 26, 1946, (R. 730). It appears, therefore, that the only consideration given by the Judge to threats, if any, was not on the hearing to dismiss without prejudice, but was on a call of the Judge for a special term for the trial of the case, and the matter of threats was not made a basis or a motive for dismissal, either directly or indirectly. There is no evidence in the record that the Learned Judge was conscious of any alleged threats when he heard the motion to dismiss. He could not be expected to rule upon something not brought to his attention.

Furthermore, and beyond all this, we feel that since Learned Counsel has digressed from the record, that we are justified in calling to the attention of this Court the sworn testimony of Honorable Ben F. Cameron, one of the leading counsel for Petitioners, on the motion to dismiss the federal cases. We have before us a transcript of the evidence taken in the four consolidated cases in the United States District Court for the Eastern Division of the Southern District of Mississippi on March 14, 1946 in causes Nos. 270, 271, 272, and 278. Learned Counsel, as a witness, was asked if there was any desire on the part of the plaintiffs to abandon the court in Jasper County and transfer the cases to the Federal Court, and therein testified

that at the hearing before Judge Neville about the production of documents, his clients "were distinctly dissatisfied with what happened there, and said to us that day 'you will never win that case in this court' "; and the record shows that the hearing at Meridian, referred to by Mr. Cameron, was held on March 15, 1945, more than a year prior to the date of Judge Neville's letter, in which he stated threats were made; and, on the question of transfer Mr. Cameron stated: "We had discussed it in Meridian back in June or July when the hearing on the motion was held. We discussed then going into the federal court." Counsel is referring to the year, 1945.

Petitioners filed their actions in the United States District Court on December 11, 1945. In discussing the filing of the Federal Court suits, Mr. Cameron further testified that counsel for petitioners "incubated the idea and studied on the idea of probably going into federal court," and that, "We had weekly conferences for the best of five months." All of which is a complete demonstration that this alleged ground of threats was a fanciful aftermath, and is much ado about nothing.

Counsel for Petitioners have set forth the proceedings in the State Supreme Court, and have quoted the opinion. That opinion speaks for itself. It was written by a Judge who had had long service as a judge of the Chancery Court before his elevation to the Supreme Court. The application for an appeal from the interlocutory decree was presented to Judge Virgil A. Griffith, presiding Judge of Division B, a judge who had had actual experience as a Chancellor, and who had written a well known text book, in common use by the bench and bar in Mississippi, on Mississippi Chancery Practice.

There is no ground whatsoever, either of law or fact, for any implication that petitioners were required to submit their case to an unfair court, or that either the Chancery

Court or the Supreme Court failed to give to this case mature consideration, and that, upon all questions raised. The Supreme Court elected to place its decision fundamentally upon one ground, to-wit, that the pendency of the cross-bill was sufficient in itself to justify the overruling of the motion to dismiss without prejudice.

A casual reading of the opinion shows that the Supreme Court of Mississippi was clearly of the opinion that Respondents were entitled to a trial upon the cross-bills, and that the effect of the decree on the cross-bill was to adjudicate against the original complainants every issue which could have been adjudicated upon the original bill. The Court, after holding that the cross-bills were properly retained, and there was no error in granting a hearing on them without the attendance of cross-defendants, who purposely absented themselves, then said: "This brings us back to the original bill—whether it should have been dismissed, retaining the cross-bills. This, as it seems to us, has now become, as to all practical purposes, a moot question. Under the cross-bills every issue and question, which could have been determined under the original bill, were adjudicated against the original complainants and cross-defendants in favor of cross-complainants and their privies. Thereby the whole matter has now become *res adjudicata*. *Von Zondt* v. *Town of Braxton*, 149 Miss. 461, 465, 115 So. 557; *Watkins* v. *Mississippi State Board*, 170 Miss. 26, 32, 154 So. 277. Upon similar principles see, also, *Griffith's Chan. Prac.*, Sections 263, 363, 571, 624.

> "In view of the foregoing announcement of our conclusion here, which completely determines the ultimate solution of the problem on the appeal before us, we do not deem it necessary to discuss other points, on both sides, ably argued in the several briefs filed.
>
> "The decree of the Chancery Court will, therefore, be and is affirmed."

It is needless to say that in rendering this opinion the Supreme Court here was dealing purely with state questions.

IV

Questions Involved

Petitioners base their claim for relief under the due process and equal protection clause of the Fourteenth Amendment of the Constitution of the United States and under Article III, Section II, Paragraph 1 of the Constitution of the United States. Under the due process and equal protection clause, they undertake to assign fourteen grounds to sustain a federal question, and under Article III, aforesaid, undertake to state six grounds for relief.

Their contention under the due process clause appears to be based upon the following erroneous contentions:

1. The state court denied due process and equal protection to petitioners in refusing to sustain their motion to dismiss without prejudice, because (a) they did not have a fair trial because of threats and so-called armed guards; (b) because they had filed four separate suits in the Federal District Court and had an absolute right, as asserted, to dismiss their cases in the state court, in order to transfer controversy to the Federal Court; (c) because they were put to trial upon a cross-bill that had not been served under state practice; and (d) because, as alleged, they had made a settlement with cross-complainants, and there was nothing to adjudicate on the cross-bill.

2. Under Article III of the Constitution the assignment is similar and raises almost identically the same questions. We submit that the sole question here involved is whether the action of the state equity court, having full jurisdiction of the subject matter, and the parties, by refusing to permit a voluntary dismissal of the original bill, without prejudice,

at a time when the complainants had instituted suits upon the same cause of action in the Federal District Court, and the affirmance of that decree by the Supreme Court of Mississippi, in an opinion based upon state decisions, policy and procedure, raises a federal question.

Respondents respectfully submit there exists no ground for the grant of the writ of certiorari in this case:

1. The jurisdiction of the state equity court to pass upon and overrule the motion of Complainants to dismiss without prejudice was full and complete, and every decision thereon was purely a state question, especially when important proceedings had taken place in the case, and had progressed to such a point that a dismissal of the original bill would be prejudicial to the interest of the defendants, and when there were cross-bills seeking affirmative relief.

2. The action of the state court in no way impinged upon the jurisdiction or authority of the Federal District Court, and could not have prevented petitioners from seeking relief in the Federal Court, regardless of the ultimate effect of a decision in either the state or Supreme Court, especially when the record shows that petitioners had already filed their action in the Federal Court when they moved to dismiss in the state court. The motion to dismiss called for a decision as to whether the state court would retain or surrender its jurisdiction, and it had a right to decide that question irrespective of any desire, or any action taken by the petitioners to prosecute the same cause of action in the Federal Court.

3. The jurisdiction of the state court had been voluntarily invoked by petitioners in an equity case, properly classified either as an action *in rem*, or at least *quasi in rem*, and had full jurisdiction of the subject matter and the parties, and full control of the *res*. Our contentions have been all along

that the Federal District Court could not take jurisdiction of this case, under the well known line of authorities, simply because the state court had prior and exclusive jurisdiction.

4. Conceding for argument that the Federal District Court was a court of concurrent jurisdiction, the fact that the petitioners desired to transfer from the state to the federal court, under all of the circumstances, in no way affected or restrained, or denied to petitioners their right to proceed concurrently in the federal court with the prosecution of their alleged claim.

5. The opinion of the Supreme Court affirming the State Chancery Court was based exclusively upon state questions, law, practice and procedure, and no federal question was presented, or decided.

6. If, as contended by petitioners, the Supreme Court erred in the reasons assigned for affirmance, the mere fact of an erroneous opinion would not raise a federal question, so long as it appears that the State courts had jurisdiction of the parties, and the subject matter.

7. There can be no contention that the Supreme Court of Mississippi decided this case upon an inadequate or an unsubstantial state question. On the contrary, it affirmatively appears that the opinion was based solely on state policy, practice and procedure.

8. It affirmatively appears, contrary to the contentions of the Petitioners, that the state court had jurisdiction of the Petitioners on the cross-bill. We say this for two fundamental reasons: (a) When a non-resident invokes the jurisdiction of a state court by bringing an action therein, he "subjects himself to the jurisdiction of the state as to the claim sued upon, and, if the law of the state so provides at the time the plaintiff brings his action, as to any set-off, counterclaim or cross-action brought against him by the defendant during the pendency of the first action." Re-

statement of the Law, Conflict of Laws, §83; and, (b) Petitioners appeared to the cross-bill and filed a demurrer thereto, and thereby entered their general appearance to the cross-action.

9. This was an action essentially to establish an alleged lost deed of ancient origin, in order to recover valuable lands, and it is elementary that immovable things, such as land, are subject to the jurisdiction of the state in which they are located. This was a local action, and by process of *lis pendens* the Chancery Court had full jurisdiction of the *res*. Restatement of the Law, Conflict of Laws, § 48.

10. Petitioners have utterly failed to show that the state court either had presented to it or decided, directly or indirectly, any federal questions, and this court can consider only federal questions passed upon by the state courts.

11. On this appeal "It is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown on the record that it did arise and was applied by the state court to the case." (Mr. Justice Storey in *Crowell* v. *Randall,* 10 Pet. 368, 9 L. Ed. 458. Therefore, all questions about alleged threats or armed guards, having no basis in any pleading or ruling of the court, are nowhere involved, either in the state equity court or before the Supreme Court.

12. There was no settlement of the controversy with the Gulf. The agreement reflected by the protective leases was an agreement in the progress of litigation, grew out of and referred to this very case, and provided on its face that Petitioners would be entitled to no royalty unless it was granted to them by the Chancery Court of Jasper County, in this very case, No. 398. The main effect of that agreement was to permit the Gulf to proceed with the development of the oil field without too much risk to itself.

V

BRIEF AND ARGUMENT

1

The Motion to Dismiss Without Prejudice Was Properly Overruled Under State Policy and Procedure

Griffith, *Mississippi Chancery Practice,* Paragraphs 534, 535;

Northern vs. *Scruggs,* 118 Miss. 353, 79 So. 227;

Peoples Bank vs. *Pennington,* 137 Miss. 653, 102 So. 386, Suggestion of Error, 103 So. 144;

Millsaps vs. *Bond,* 64 Mis. 453, 1 So. 506;

State vs. *Hemmingway,* 69 Mis. 491, 10 So. 576;

Adams vs. *Commercial Co.,* 113 Miss. 608, 74 So. 435;

C. & A. R. R. Co. vs. *Union Rolling Mill Co.,* 109 U. S. 702, 3 Sup. Ct. 594, 27 L. ed. 1081, (Cited by the Mississippi Supreme Court in *State* vs. *Hemmingway, supra,* and referred to in *Peoples Bank* vs. *Pennington, supra*);

Pullman Palace Car Co. vs. *Central Transp. Co.,* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. 808, (Cited with approval by the Mississippi Supreme Court in *Northern* vs. *Scruggs, supra*);

Shivers vs. *R. R.,* (C. C.), 4 Fed. 97;

Cooper vs. *Lewis,* 2 Phill. Chan. 181;

Mitchell vs. *Film Transit Co.,* 13 So. (2d) 154, 194 Miss. 550 (The latest expression of our Supreme Court on the right to dismiss).

We copy only one excerpt from this latest expression:

"It is true that the right of plaintiff or complainant to take a non-suit is large, nevertheless it is not unlimited. It is in the discretion of the court. When, in

any respect, a case has proceeded to that point, or when such steps have been taken that the defendant has thereby secured some substantial right which would be destroyed by the dismissal, it should not be permitted." (Citing authorities).

Surely the Federal Court would not entertain jurisdiction to determine whether the discretion so vested in the state court was properly or improperly exercised. We contended in the state court, and still contend, that Petitioners, or complainants, were estopped to dismiss, and likewise were guilty of laches. These are some of the grounds which the Supreme Court of Mississippi decided were now moot questions, in view of their decision to affirm the case because of the pendency of the cross-bills.

2

No Violation of the Due Process Clause of the Federal Constitution

We hesitate to burden the Court with the citation of the numerous decisions construing the Due Process Clause in cases similar to the case at bar. This Court is being asked to review the decision of a purely local action involving essentially the ownership of land located in Mississippi and construing state jurisdiction, practice and procedure. This case was tried just as if the complainants were residents of Mississippi. As non-residents they had the right to submit their cause to the state court and did so. After invoking the jurisdiction of the state court in the matter of discovery and inspection of title deeds, they concluded manifestly that the evidence developed through discovery disproved their case, and having frightened the mineral lessees into purchasing protection, and after making the important agreement arising out of and in the progress of the litigation that they would not be entitled to royalties until they

received a favorable decision from the state court in this identical cause No. 398, they wrongfully filed four separate suits in the Federal District Court on the same cause of action and sought to transfer the litigation from the state to the federal court by the process of seeking dismissal without prejudice. There is no provision under the constitution or laws, either state or federal, that permitted the original complainants to transfer their cause, voluntarily submitted by them, from the state court to the federal court.

The 14th amendment to the Constitution of the United States in no way undertakes to control the power of a state to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard, before the issues are decided. *Iowa &c. R. Co.* v. *Iowa,* 160 U. S. 389, 40 L. ed. 467; *Rogers* v. *Peck,* 199 U. S. 425, 50 L. ed. 256.

If all persons are treated alike under the law under the same circumstances, no person can be said to be deprived of equal protection of the laws. *Leeper* v. *Texas,* 139 U. S. 462, 35 L. ed. 225; *In re Converse,* 137 U. S. 624, 34 L. ed. 796; *Caldwell* v. *Texas,* 137 U. S. 692, 34 L. ed. 816.

If persons have the benefit of a full and fair trial in the several courts of their own states, where their rights are measured by general provisions of law applicable to all in like condition, and as a result are deprived of their property, it can not be said that such deprivation is without "due process of law." *Marchant* v. *Pennsylvania R. Co.,* 153 U. S. 380, 38 L. ed. 751.

When parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without tdue process of law, within the meaning

of the 14th amendment to the United States Constitution. *Central Land Co.* v. *Laidley,* 159 U. S. 103, 40 L. ed. 91.

When parties have been fully heard in the regular course of judicial proceedings, an erroneous decision does not deprive the unsuccessful party of his property without due process of law. *Bonner* v. *Gorman,* 213 U. S. 86, 53 L. ed. 709; *Ong Chang Wing* v. *United States,* 218 U. S. 272, 54 L. ed. 1040; *American Land Co.* v. *Zeiss,* 219 U. S. 47, 55 L. ed. 82; *Kentucky Union Co.* v. *Kentucky,* 219 U. S. 140, 55 L. ed. 137; *Appleby* v. *Buffalo,* 221 U. S. 524, 55 L. ed. 838.

In *Marrow* v. *Brinkley,* 129 U. S. 179, 32 L. ed. 654, Chief Justice Fuller for this Court said "unless it appears affirmatively that the decision of a federal question was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it, this court has no jurisdiction of a writ of error to a state court. In this case the judgment as rendered involved the decision of no such question, and none such was actually decided.

"Nor can jurisdiction be retained upon the suggestion, made for the first time in this court, that if the court of appeals, proceeding upon the principles of general law only, were found to have erred in the rendition of its decree, the State of Virginia had thereby deprived the plaintiffs in error of their property without due process."

"The Supreme Court of the United States will decline to review, on certiorari to a state court, a question asserted to arise under the Constitution of the United States where, because of uncertainty as to the precise grounds of the decision rendered by the state court, a review of the constitutional question is not clearly necessary to a decision of the case." *Minnesota* v. *National Tea Co.,* 309 U. S. 551, 60 S. Ct. 676, 84 L. ed. 920.

"The interpretation by the courts of a state of the written and unwritten laws of the state is not reviewable by the Supreme Court of the United States." *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 50 S. Ct. 451, 74 L. ed. 1107.

"A decision by a state court of last resort amounting merely to an erroneous construction of statutes of the state is not a denial of the due process guaranteed by the Fourteenth Amendment so as to be reviewable by the Supreme Court of the United States." *Neblett* v. *Carpenter,* 305 U. S. 297, 59 S. Ct. 170, 83 L. Ed. 182.

"The contention that a state court erred in its determination that there was evidence to sustain a finding does not present a Federal question." *Bell Teleph. Co.* v. *Pennsylvania Pub. Utility Comrs.,* 309 U. S. 30, 60 S. Ct. 411, 84 L. ed. 563.

"The Supreme Court of the United States will not review judgments of the state courts that rest on adequate and independent state grounds." *Herb* v. *Pitcairn,* 324 U. S. 117, 65 S. Ct. 459, 89 L. ed. 789.

"An appeal from a state court to the Supreme Court of the United States will be dismissed where the judgment below rests upon a non-federal ground adequate to support it." *Holly* v. *Lawrence,* 318 U. S. 518, 63 S. Ct. 394, 87 L. ed. 434.

"The Supreme Court of the United States will not review a state decision resting on an adequate and independent non-Federal ground even though the state court may have also summoned to its support an erroneous view of Federal law." *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 65 S. Ct. 1475, 89 L. ed. 2092.

"The Supreme Court of the United States will not review a state court's decision of a Federal question where it is doubtful whether the decision does not rest on a non-Federal

ground adequate to support it." *Flournoy* v. *Wiener*, 321 U. S. 253, 64 S. Ct. 548, 88 L. ed. 708.

In *Hibben* v. *Smith*, 191 U. S. 311, 48 L. Ed., 195, 201, this Court among other things said "The Federal courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a state applicable to all persons in like circumstances and conditions." See also annotation 63 L. R. A. 572; *Chicago, etc., R. R. Co.* v. *Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979; annotation, full and complete with abundant authority, 84 L. ed. 925.

3

No Violation, Article III, Sec. II, Paragraph 1

Petitioners Had no Constitutional Right to Litigate in the Federal Court, and Even if They Had They Waived That Right by Submitting Their Cause Voluntarily to the State Court.

It is needless for us to cite authorities on the general proposition that the jurisdiction of the Federal District Court is not the exercise of constitutional jurisdiction, but purely statutory authority. Also, that Petitioners had no constitutional rights to litigate in the Federal Court. Conceding that they had an option in the first instance to sue in the Federal Court, it is admitted that they had the right to sue in the State Court, and did so. When they filed their bill in the State Court they submitted themselves to the jurisdiction of that court for all purposes. In Moore's Federal Practice, under the new Federal Rules, Volume 3, 1946 Supplement, discussing the general topic, "Dismissal of Actions," on page 48 we find the following:

"Dismissal sought to frustrate removal—Some cases have held that the court in its discretion may sustain a plaintiff's motion for leave to dismiss a removed cause

where the purpose of dismissal is to defeat removal and get the action back into a state court. It has been said that the defendant has no absolute right to litigate in federal court. See Lawson *v.* Moore (W. D. Va. 1939) 29 F. Supp. 175; Welter *v.* E. I. DuPont De Nemours & Co., Inc. (D. Minn. 1941), 112 D. J. Bull. 19, 4 Fed. Rules Serv. 41 a.22, Case No. 3, 1 F. R. D. 551; Oblak *v.* Armour & Co. (W. D. Mo. 1941), 4 Fed. Rules Serv. 41 a.22, Case No. 2; Home Owners Loan Corp. *v.* Huffman (C. C. A. 8th, 1943) 134 Fed. (2d) 314 (dismissal after reversal and demand; no prejudice to defendant in having second trial in state court rather than federal court); McLean *v.* Wabash R. Co. (W. D. Mo. 1942), 7 Fed. Rules Serv. 41a22, Case No. 3; Mott *v.* Connecticut General Life Ins. Co."

We emphasize the statement made that the defendant has no absolute right to litigate in Federal court. Conceding, as stated, that Petitioners had a statutory right to invoke the jurisdiction of the Federal District Court, they ought not to be permitted to do so after voluntarily invoking the jurisdiction of the state court in a purely local action, properly classified as an action in rem, or at least quasi in rem. The State court had full jurisdiction of all parties, the entire subject matter and the control of the res. Whether they had a right, an absolute right, to dismiss in the State court is purely a State question. They had no unqualified right to dismiss, and that issue was decided against them, both in the lower State court and in the Supreme Court.

4

The Federal Court Had no Jurisdiction Because of the Pendency of This State Court Action

The original bill of complaint in this case shows that the original complainants, after experimenting and invoking the jurisdiction of the State court, and after impor-

tant proceedings had taken place and the cause had arrived at that stage when it would be prejudicial to the rights of the defendant to permit a dismissal without prejudice, then filed their motion to dismiss for the very purpose of transferring jurisdiction to the Federal court. They undertook to break the State court action by filing four cases, and to submit the same issues for the determination of the Federal court in four parts, but the parties are the same, the essential nature of the suit is the same, and the fundamental relief prayed for is the same. The Federal court had no jurisdiction for two reasons, first, because of the prior jurisdiction of the State court over the land sued for, and secondly, the plaintiffs in the Federal court omitted from their bills many indispensable parties.

On the first reason assigned it is well settled that where property is in the actual or potential possession of a court of competent jurisdiction, such possession cannot be interfered with by process of another court.

Empire Trust Company v. *Brooks,* 232 Fed. 641, 648, defines the essential nature of the conflict of jurisdiction between courts of concurrent jurisdiction:

> "It means that the issues involved, relief prayed for and the parties to the two suits are so substantially alike that the lis pendens of the last brought is included in the first."

An examination of the pleadings in both suits leaves no doubt that the two suits are so much alike that the *lis pendens* of one includes the other, and a decision in one will be binding in the other.

Another fair definition of the rule will be found in *Powers* v. *Blue Grass Building and Loan Association,* 86 Fed. 705, as follows:

> "The principle that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be interfered with by process out of

another court is well settled. Buck *v.* Colbath, 3 Wall. 334; Krippendorf *v.* Hyde, 110 U. S. 276; Sup Ct. 27; Byers *v.* McAuley, 149 U. S. 608, 13 Sup. Ct. 906; Compton *v.* Railroad Co., 31 U. S. App. 486-523-530, 15 C.C.A. 397, and 68 Fed. 263. There are two classes of cases in which the court first obtaining jurisdiction should be suffered to proceed without any interference by process from another of concurrent jurisdiction. The first class consists of those cases in which the exercise of jurisdiction by one court will interfere with the prior possession of the res by another court of competent and concurrent jurisdiction. Prippendorf *v.* Hyde, 110 U. S. 276, 4 Sup. Ct. 27; Heidritter *v.* Oil-cloth Co., 112 U. S. 294, 5 Sup. Ct. 135; Byers *v.* McAuley, 149 U. S. 608, 13 Sup. Ct. 906. The second class is where there are two suits pending in different courts of concurrent jurisdiction, in which the parties are the same, and which involve and affect the same subject-matter, and where the jurisdiction of neither is complete nor effectual unless it may, if necessary or proper, exercise exclusive dominion over the res in litigation. The cases relied upon by counsel for defendants of Gates *v.* Bucki, 12 U. S. App. 69, 4 A.C.C.A. 116 and 53 Fed. 961; Meritt *v.* Barge Co., 24 C.C.A. 530, 79 Fed. 228; Zimmerman *v.* S. Relle, 25 C.C.A. 518, 80 Fed. 417; and Sharon *v.* Terry, 36 Fed. 337, are cases belonging to the latter class. The conflict exists in such instances because the suits are in the nature of suits in rem. The mere fact of the pendency of two suits in personam between the same parties and upon the same identical cause of action, in courts of different jurisdictions, does not make a case in which the jurisdiction of one is impeded or interfered with by the action of the other. Staunton *v.* Embry, 93 U. S. 548. To make a case of conflict, *the two concurrent suits must involve relief against the same res.* The distinction here drawn is recognized in the cases last cited, and is clearly indicated in Buck *v.* Colbath, 3 Wall. 334. If the parties are the same, and the issues are the same, and the relief sought involves dominion over the same res, and cannot be effectually granted if dominion over the res be taken by process

> from another court, it is a case where the second court should regard the jurisdiction of the first as exclusive, and hold its hands until the court first obtaining jurisdiction has terminated the case pending."

The fundamental decision upon this question is *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 67 L. Ed. 226, 43 Sup. Ct. 79, 24 A.L.R. 1077. There the construction company filed suit in the District Court alleging a breach of a contract to pave certain streets. Thereafter Kline filed suit in a state court upon the same contract against the construction company and its surety. Each of these suits was for the recovery of damages. Thereupon the construction company applied to the District Court for an order enjoining Kline from prosecuting the state case. The District Court denied the injunction. On appeal to the Supreme Court the Circuit Court of Appeals was reversed, the District Court was affirmed, and the injunction was denied. The Court pointed out that if a Federal Court has acquired jurisdiction of the subject-matter of a cause it may enjoin the parties from proceeding in a state court, where the effect of the action in the state court would be to defeat or impair the jurisdiction of the Federal Court. And the Court said:

> "Where the action is in rem, the effect is to draw to the Federal court the possession or control, actual or potential, of the res, and the exercise by the State court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction of the Federal court, already attached. The converse of the rule is equally true,—that where the jurisdiction of the state court has first attached, the Federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the State court's jurisdiction."

The Court pointed out that if the controversy was merely over a question of personal liability which did not involve

the possession or control "of a thing," an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending, but that each court is free to proceed, and when one has entered judgment, that judgment may be pleaded as a bar in the other case.

The Court said that the recognition of the exclusive jurisdiction of the court which first acquires jurisdiction over a particular matter is stronger than a mere recognition of the principle of comity, but "is a principle of right and law." And:

> "The rule is not limited to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate involvent estates, and in all suits of a like nature * * *. The rule is limited to actions which deal either actually or potentially with specific property or objects."

This principle, so thoroughly exemplified and developed in the *Kline* case, has been specifically applied in case to quiet title.

President, Etc. of Bowdoin College v. *Merritt,* 59 Fed. 6, arose on the following state of facts: The beneficiaries of a trust sought to enjoin Merritt from asserting claim to the trust property, and, says the Court, the purpose is "to quiet the title." Thereafter Merritt filed suit in a state court seeking the appointment of a receiver for the property. Thereupon plaintiff filed a supplementary bill in the Federal court to enjoin Merritt from prosecuting his proceeding in the state court. The injunction was granted because if Merritt "Should succeed in having a receiver appointed of the property, the jurisdiction of this Court would be very much embarrassed, if not defeated or impaired." The Federal

court had jurisdiction of the subject-matter of a suit to quiet title. The proceeding in the state court would have deprived it of jurisdiction already attached. That proceeding was therefore enjoined.

In *Stirling* v. *Seattle, Etc. Rwy.*, 198 Fed. 913, an action had previously been instituted in a state court in which certain frauds, wrongs and breaches of trust upon the part of certain trustees were alleged, and further, that a corporation was being used by certain of the defendants as an instrument for its own destruction and a receiver was appointed. An action was subsequently filed in the Federal court asking for the appointment of a receiver. It was held that the suit in the Federal court should be stayed pending final determination of the proceedings in the state court.

> "It is contended that the suit in the state court is not one in rem, but purely in personam. It may not be purely a suit in rem, but enough of its nature has been disclosed by the foregoing statement to show that, if the suit in this court should proceed to the dissolution of the corporation and the disposition of all of its property, and thereafter the plaintiff should prevail in the suit in the state court, the action taken by this court would have deprived him of much of the relief therein sought. There would be no property left to turn over to the corporation. It would have no franchise to protect. All of the elements of the trust would have been dissipated. The responsibility of the trustees and the beneficiaries to answer to a personal judgment, alone, would remain. The defendants, being residents of Illinois, even that benefit might, under certain circumstances, be lost. It is also apparent that, in order to effectually grant and insure to the plaintiff the relief sought by him, it might, in the course of proceedings, become necessary for the court to take charge of the property of the defendant railway company."

The limitations upon the length of a brief preclude us from citing other interesting applications of the doctrine of the *Kline* case. Some of those applications are to be found in *Farmers Etc. Co.* v. *Lake Etc. R. R.*, 177 U. S. 51, 44, L. Ed. 667, 20 Sup. Ct. 564; *Pacific Etc. Co.* v. *Lewis*, 241 U. S. 440, 60 L. Ed. 1084, 36 Sup. Ct. 637; *Harkin* v. *Brundage*, 267 U. S. 36, 72 L. Ed. 457, 48 Sup. Ct. 268; *Westfeldt* v. *N. C. Mining Co.*, 166 Fed. 706.

Mr. Justice Shiras in *Farmers' Loan & Trust Company v. Lake Street Elevated R. Co., supra*, dealt with a case where a bill had been filed in a Federal court to foreclose a mortgage. Subsequently, an action was commenced in the state court, and there was an injunction by the state court against proceeding in the Federal court, and a part of the opinion reads:

> "The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of coordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons.
>
> "Nor is the rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts. Peck *v.* Jenness, 7 How. 612, 12 L. Ed. 841; Freeman *v.* Howe, 24 How. 450 16 L. Ed. 746; Moran *v.* Sturges, 154 U. S. 256, 38 L. Ed. 981, 14 Sup.

St. Rep. 1019; Central Nat. Bank *v.* Stevens, 169 U. S. 432, 42 L. Ed. 807, 18 Sup. Ct. Rep. 403; Harkrader *v.* Wadley, 172 U. S. 148, 43 L. Ed. 399, 19 Sup. Ct. Rep. 119."

The rule of conflict of jurisdiction is likewise discussed by Judge Taft, speaking for the Supreme Court of the United States, in *Harkin* v. *Brundage, supra.* The case stated:

"The case presents a controversy between state court receivers and the receiver of a Federal court over the possession of the property and assets of the Daniel Boone Woolen Mills Corporation. It is here by certiorari to the judgment of the circuit court of appeals for the seventh circuit affirming a decree of the district court for the northern district of Illinois. The receivers in the state court were appointed on the prayer of what was called a stockholders' bill. The receiver in the Federal court was appointed on the prayer of what was called a creditor's bill. The receiver in the Federal Court was appointed first; but the bill in equity upon which the state court receivers were appointed was filed five days before the bill in the Federal Court. The receivers in the state court filed a motion in the Federal court requesting that the property in the hands of the Federal court receiver be transferred to the state court receivers, on the ground that the state court by the earlier filing of the bill in that court had acquired constructive possession and its receivers were entitled therefore to actual possession of the property."

The Court in part said:

"The principle which should govern in a conflict of jurisdiction like this has been a number of times stated by this court. As between two courts of concurrent and co-ordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of the property by filing the bill is entitled to retain it without interference and cannot be deprived of its right to do so,

because it may not have obtained prior physical possession by its receiver of the property in dispute; but where the jurisdiction is not the same or concurrent, and the subject-matter in litigation in the one is not within the cognizance of the other, or there is no constructive possession of the property in dispute by the filing of a bill; it is the date of the actual possession of the receiver that determines the priority of jurisdiction. Morgan *v.* Sturges, 154 U. S. 256, 283, 284, 38 L. ed. 981, 990, 991, 14 Sup. Ct. Rep. 1019; Palmer *v.* Texas, 212 U. S. 118, 53 L. ed. 435, 29 Sup. Ct. Rep. 230; Wabash R. Co. *v.* Adelbert College, 208 U. S. 38, 54, 52 L. ed. 379, 386, 28 Sup. Ct. Rep. 192; Farmers' Loan & T. Co. *v.* Lake Street Elev. R. Co., 177 U. S. 51, 61, 44 L. ed. 667, 671, 20 Sup. Ct. Rep. 564, and Adams *v.* Mercantile Trust Co., 15 C. C. A. 1, 30 U. S. App. 204, 66 Fed. 617. The difficulty in the application of the rule is in determining whether the conflicting jurisdictions are actually concurrent and the same. A doubtful question, too, is whether the bill is of such a character that its filing is the taking of constructive possession of the property.

"In Palmer *v.* Texas, the suit in the state court was an action by the state to forfeit the charter of the corporation and wind up its affairs. The suit in the United States court was an action by a stockholder to liquidate the corporation. Both were substantially alike in purpose. The state court had proceeded so far as to appoint receivers of the property and had merely delayed their taking possession until the case might be examined on appeal in the court above. The state court was held to be in constructive possession all the time, and was given priority of jurisdiction over the property as against the receiver of a Federal court who had taken actual possession under a subsequent bill.

"In Farmers' Loan & T. Co. *v.* Lake Street Elev. R. Co. the suit in the Federal court was an action to foreclose a mortgage, and the one in the state court sought to enjoin the foreclosure. In that case the controversies

were held to be substantially the same, and the filing of the bill in foreclosure in the Federal court was held to be a constructive possession of the property." • • •

"In this country, in which in every state we have courts of concurrent jurisdiction under the Federal and state authority, it is of the highest importance that conflict of jurisdiction should be avoided. It can only be avoided by forebearance and comity, and by enforcing upon the parties and counsel engaged the utmost good faith and the fullest disclosure in one jurisdiction with reference to what are the exact facts relevant to litigation in a corresponding case in the other."

See also *Penn. Gen. Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, 79 L. ed. 850, wherein Mr. Justice Stone recognized our dual judicial system, commented thereon, differentiated between suits in personnem and suits in rem, and reviewed some of the leading authorities. He stated "But if the two suits are *in rem* or *quasi in rem,* requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. • • • The principle, applicable to both Federal and State courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other." In the case at bar Petitioners in the state court claim full ownership of the land and prayed for writs of possession, as and when necessary, and placed of record a *lis pendens* notice, which under the state practice brought within the jurisdiction of the Chancery Court the control of the lands, as much so as if the sheriff of the county had pitched his tent thereon and held it for the court.

We say, therefore, upon the authorities, that our state court had prior and exclusive jurisdiction and is the only

court, in fact, which did have full jurisdiction of all the parties and all of the subject matter.

On the second proposition, that Petitioners omitted from the Federal court suits indispensable parties, the record shows, and they will not deny that they consciously omitted all residents of Louisiana and Texas, who were parties to the State court litigation, aand likewise omitted twenty acres of land involved in this suit. It is true that Judge Mize overruled our motion to dismiss in the Federal Court, but he did so upon the assumption, and certain authorities not now necessary to review, that he could by his decree confine the judgment to those persons who were then before his court, so long as he did not make any adjudication affecting the rights of those persons who had been consciously omitted, but, since Judge Mize's ruling the Circuit Court of Appeals has reversed the Learned Judge on the identical question involved, in *Calcote* v. *Texas Pac. Coal and Oil Co.*, decided July 31, 1946, 157 Fed. (2d) 216, Certiorari denied November 18, 1946, 91 L. Ed. 80 (Advance Opinion No. 1), rehearing denied, 91 L. Ed. 242 (Advance Opinion No. 3). Motions to dismiss in the Federal Court are now being renewed and have been set for argument before Judge Mize on September 29, 1947.

We confidently assert, therefore, that it would have been a futile thing to permit the Petitioners to dismiss without prejudice in the State court and to refile, or to proceed with their four actions, as stated, in the Federal court.

5

A State Court's Decision Based Upon a Non-Federal Ground Will Not Be Reviewed by This Court, Even Though There Were Errors in Administering a State Statute.

In *Lent* v. *Tillson*, 140 U. S. 317, 35 L. Ed. 419, headnote 4 reads:

> "Errors in administering a state statute, which do not involve jurisdiction of the subject matter, or of the parties, do not justify this court in reexamining a judgment of a state court, to hold that the state had deprived, or is about to deprive plaintiffs of their property without due process of law."

In *Honeyman* v. *Haman*, 300 U. S. 14, 81 L. Ed. 476, headnote 1 reads:

> "Before the Supreme Court of the United States can undertake to review a state court decision it must appear affirmatively from the record, not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause."

In *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481, 86 L. Ed. 1116, headnote 2 reads:

> "A state court's consideration of a State Statute based purely on local law is conclusive on the Supreme Court of the United States."

Let us bear in mind at this point that opposing counsel, through their petition and brief, wrongfully assumed that the complainant has an unqualified statutory right to dismiss his action in a State equity court. That question was decided against petitioners and practically all of the specifications of error are based upon that wrongful assumption. It would be absurd to assume that the United States Supreme Court should review the action of every State court in the nation to determine whether it rightfully or wrongfully refused a dismissal without prejudice. Especially is this true when we consider the impact of the rule announced in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, and the many decisions of this Court applying the doctrine that State Law and decisions bind the Federal Court.

6

Additional Response to Assignments Argued by Petitioners in Their Printed Brief

In overruling Petitioners' motion to dismiss without prejudice, Counsel state that it cannot be doubted that petitioners had an absolute right to dismiss. On the authorities and on the binding decision of the Supreme Court, this was a qualified right and fell within the numerous exceptions announced by text-book writers and by the decisions of Mississippi. What we have heretofore said in this response is sufficient. The observations of this Court in the *Pullman Palace Car Co.* case, *supra, is* here quite pertinent: "The denial of the motion was made in connection with the application of the Central Co. to file a cross-bill in which it would seek to avail itself of the tenders made by the Pullman Co. in the original bill. Such an application for leave to file a cross-bill seeking affirmative relief, while at the same time availing itself of those tenders of relief made by the original complainants, would furnish additional ground for exercise of the discretion of the court in refusing to grant the application for leave to discontinue."

A

Counsels' Argument II, Page 49

Counsel here undertake to assign two or three grounds in one:

> "In denying interlocutary appeal to settle Petitioners' right to dismiss and calling a special term and forcing Petitioners to go to trial in the face of threats and armed guards" etc.

We have quoted from the memorandum opinion of Judge Griffith denying the interlocutory appeal. One ground for the denial was, and is, the rule that there can be no inter-

locutory appeal from a decree overruling a motion to dismiss, which is purely a procedural matter. Of course, error can be assigned when the case reaches the Supreme Court on its merits. Counsel can cite no authorities in Mississippi upholding his right to appeal from an interlocutory order, procedural in its nature. Furthermore, due process of law has never required that a State shall provide for a review of any justiciable issue by an Appellate Court. This doctrine has been applied even in criminal cases. *Andrews* v. *Swartz,* 156 U. S. 272, 39 L. Ed. 422.

In Griffith's Chancery Practice, Section 686, it is said:

> "The statute as to appeals from interlocutory orders or decrees is as follows: 'An appeal may, in sound discretion, be granted by the Chancellor in term time, or in vacation, from any interlocutory order or decree, whereby money is required to be paid, or the possession of property changed, or when, having sustained or overruled a demurrer or motion, he may think an appeal proper in order to settle all the controlling principles involved in the cause, or in exceptional cases, to avoid expense and delay; * * * such appeal, if allowed, must be allowed by the court or Chancellor, and he shall determine whether the appeal shall operate as a supercedeas or not.' "

In paragraph 682 is a discussion of the general topic, "Interlocutory appeals generally not favored," and many illustrations given where the court properly overruled applications therefor.

B

Calling a Special Term and Forcing Petitioners to go to Trial in the Face of "Threats and Armed Guards"

The implication is that Judge Neville called a special term to checkmate Petitioners in their effort to proceed in the Federal Court, and that the special term was called for

the one purpose of trying this case. There is no basis for this conclusion, and there is no basis for alleged threats, and there were no "armed guards."

C

COUNSELS' ARGUMENT III, PAGE 56

In Proceeding to Judgment Against Petitioners on an Ex Parte Hearing at a Time When the Case Was Not Triable Because of the Absence of Necessary Parties.

Counsel are here undertaking to predicate error on the fact, as alleged, that Claudies Newell and Paul Ellis Newell were in the military service of the United States, and on behalf of some of the defendants, a motion to stay proceedings was filed. (See Appendix 15). The record shows that the joint answers of Mason Newell, Sr., individually, and Mason Newell, Sr., as guardian of the estates of the said named, soldiers, together with others, was filed, (R. 175). Not only was an answer filed on behalf of Claudies Newell and Paul Ellis Newell, but they were actually represented by their attorney, J. R. Buchanan, who appeared at the January, 1946, Term of Court and insisted upon a trial of the cause, and who objected to a dismissal without prejudice on behalf of his clients, and who, at the special term of the court stated: "We wish the court to proceed with the trial of the case." (Appendix, page 73). No decree was ever entered on the motion to stay, and if these soldiers had any rights based upon the Soldiers and Sailors Relief Act, to have the proceedings stayed, they obtained no order of the Court thereon, or any ruling thereon, proceeded to file their answer, and through their attorney insisted upon a trial of the cause. It does not now lie in the mouth of the Petitioners to complain of something which these defendants never could complain of.

D

COUNSELS' ARGUMENT IV, PAGE 58

In Proceeding to a Trial on the Merits * * * When Mississipi Practice Permitted Only Dismissal With Prejudice, After Petitioners Declined to Proceed Further.

The Chancery Court entered a decree dismissing the original bill with prejudice, and then adjudicated the rights of the Cross-Complainants. Whether the adjudication should have been in one or two decrees was immaterial. Counsel admits that the decree as to his clients would be a dismissal with prejudice. Petitioners would take nothing, and it would be immaterial with them whether the Court heard evidence on the cross-bills and made one decree fit all of the issues before the Court. Furthermore, Petitioners are in no position to complain of the procedural steps taken after they walked out and declined to participate. Any objection as to procedure should have been made before the lower Court, and exception fully noted. It is admitted by counsel that after they declined to submit their case, after the Court had declined to permit them to dismiss, then, that the only decree that the Court could enter would be a dismissal with prejudice. That means that they were then and there adjudicated not to be the owner of the land, or any interest therein, and that all of the Defendants would be unaffected by the original adverse claim of the Petitioners. The Supreme Court, by its opinion, and by judgment affirmed the decree of the Chancery Court in its entirety.

E

COUNSELS' ARGUMENTS V-X INCLUSIVE, PAGE 60, *et seq.*

Counsels' argument on Points V-X, inclusive, relate- to the cross-bill of the Ridgeways, the cross-bill of the Gulf, and the effect of the Court's decree thereon. For brevity,

we adopt the separate responses being filed on behalf of the Gulf and the Ridgeway Group on these wrongful contentions of counsel. We do again emphasize that the landowners, who are Respondents, were parties to the litigation, and in privity of contract with the mineral lessees. There could be no adjudication that the Cross-Complainants had valid leases and mineral interests without at the same time adjudging, or at least without an adjudication having the necessary effect of holding, that these Respondents were the true owners of the land and had a right to execute these mineral leases. One thing is certain, and that is that the final decree adjudicated that the Complainants take nothing, and therefore, as between the Petitioners herein and the Respondents, our clients owned the lands, and all the minerals, unaffected by the adverse claim of Petitioners. It could not be adjudicated that the Gulf had a valid lease, for illustration, from the Talmadge D. Lewis family, without also adjudicating that the Talmadge D. Lewis family, Gulf's lessors, owned the land covered by the leases. A simple decree dismissing the original bill, with prejudice, would accomplish that result, on the fundamental issue of ownership of the land, as between Petitioners and Respondents.

VI

Conclusion

Counsel for Petitioners state that the pattern for their petition was set by this Court in its opinion in *Angel* v. *Bullington*, 91 L. ed. 557, Advance Opinions No. 8. This case is more authority for Respondents than for Petitioners. Therein this Court did declare that a State Supreme Court could not "put a Federal claim aside as though it were not in litigation," and so we say here that Learned Counsel cannot inject a Federal question or claim there is a Federal

question by the use of the "talismanic word" constitution. Furthermore, this case accurately holds, as shown by Headnote 2, that "for purposes of diversity jurisdiction a Federal Court is, in effect, only another court of the State." Petitioners had their election in the outset to choose between a State and a Federal Court, provided only they could maintain diversity of citizenship, which we here deny; but assuming that they could state a case of diversity, they only had a choice of two courts and they chose the proper forum to assert an adverse claim or title to lands. We say it was the *only* court having jurisdiction. As stated by the Circuit Court of Appeals for the Eighth Circuit, in *Heck* v. *Nicholas*, 6 Fed. (2d) 10, as shown by the headnotes:

> "1. Constitutional law—State's sovereignty over real property is supreme, including right to establish rules of law and procedure for transfers of title.
>
> "State's sovereignty over real property within its boundaries is supreme, and it may establish rules of law and procedure affecting transfers and settlement of title without violating federal Constitution, provided property is brought under control of its court and reasonable opportunity to be heard given all interested parties.
>
> "2. Action—Action to remove lien or set aside mortgage affecting real property is action *in rem*.
>
> "Action to remove lien or set aside mortgage affecting real property is in principle an action *in rem*.
>
> "3. *Lis pendens*—Nonresident purchaser of note and assignee of mortgage, failing to record assignment before institution of suit to cancel mortgage, held bound by decree therein.
>
> "Nonresident purchaser of note, taking assignment of mortgage of realty securing it, but failing to record his assignment before institution of suit to cancel mortgage and filing of *lis pendens*, under Comp. St. Neb.

1922, Section 8595, Held bound by decree canceling mortgage."

Surely, after filing and prosecuting their state court action from June 10, 1944, to on or about December 12, 1945, and when so many proceedings have been had in the case as hereinbefore in this brief outlined, it would have been highly inequitable and prejudicial to the rights of these Respondents to permit Petitioners to dismiss without prejudice and refile the same suit in the Federal Court, and thereby to continue to prevent these Respondents from realizing on their royalties, or selling any of their mineral rights, or improving their properties as they would normally do in the absence of an adverse claim of this nature.

We say, in brief, and in conclusion, that there is no Federal question upon which this Court could or should assume jurisdiction.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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No. 262

N. L. HUDSON, ET AL.,
Petitioners,

vs.

GULF REFINING CO., ET AL.,
Respondents

RESPONSE OF ALL RESPONDENTS TO PETITIONERS' REPLY

JOHN E. GREEN, JR.,
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Jackson, Mississippi.

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RESPONSE OF ALL RESPONDENTS TO PETITIONERS' REPLY

I

All Respondents re-adopt that precedently said, submitting that it has not been satisfactorily answered and that certiorari should be denied, but certain unexpected angles have been integrated by Petitioners' reply whereto additional response is here made.

Response to Petitioners' Part I.

Hartford Accident and Indemnity Company v. *Bunn,* 285 U. S. 169, 76 L. Ed. 685, was decided March 14, 1932. Thereafter, Rule 48 was adopted and it may well be that this rule was effectual as to State judgments, compare *Wilson* v. *City of Lexington,* 153 Miss. 209, 119 So. 795, but there was no Congressional sanction as in the case of the Rules of Civil Procedure. This question as to the efficacy

thus to change that precedently existing in part by statute is the question, with deference, as yet undetermined.

II

Response to Petitioners' Part II, using the same numbering employed by Petitioners.

I

Opposite counsel erroneously say, where the cross-bill had been filed, p. 8:

> "The Supreme Court of Mississippi, however, did not sustain the chancellor's view, but assumed *that right to dismiss to exist.*"

Thereon, Mississippi's Supreme Court did not pass abstractly but, bearing in mind Petitioners' motion to dismiss the entire suit wherein these cross-bills had been filed, distinctly said: (Res. Br. 96, 97)

> "*Had there been no cross-bills, it may have been* that the complainants would have had the right to dismiss, as they sought to do, but leaving that question aside for the moment, we are of the opinion that they had no right to do so and at the same time secure the dismissals of the cross-bills, unless by the consent, express or implied, of the cross-complainants." (Italics ours, unless otherwise noted.)
>
> • • • • • • •
>
> "We are of the opinion, therefore, that the court was correct in not dismissing the cross-bills, and in proceeding to a final hearing on them, without the attendance of cross-defendants, who purposely absented themselves; * * *".

Petitioners never recognized that the Chancellor refused to dismiss the suit as an entirety and conceded that by reason thereof it was essential for Petitioners to assert their

right in Mississippi's Supreme Court, that after such refusal they take no step therein. *Mitchell* v. *Film Transit Co.*, 194 Miss. 550, 13 So. 2d 154. Petitioners specifically concede, original Br. p. 50:

> "* * * It was extremely urgent that Petitioners be given this opportunity to test finally their right to dismiss because of the rule of Mississippi practice providing that a litigant waives his right to dismiss without prejudice if he goes to trial on the merits—see *e.g.* Mitchell et al., *v.* Film Transit Co., et al., (1943) 194 Miss. 550, 13 So. (2) 154, from which the fifth syllabus is quoted:
>
> " 'Where guardian proceeded with trial after his motion to non-suit chancery case was overruled as if no motion had been made, he could not thereafter complain of order overruling motion.' "

Conceding, further, at page 58:

> "Under Mississippi procedure, when Petitioners declined to proceed further at the special term of chancery court the only thing the chancellor could do was to *dismiss their bill with prejudice:*
>
> " 'In order to carry out his purpose the guardian should have declined to proceed with the trial and thereupon the defendant *would have been entitled to a dismissal with prejudice,* which would have been a final judgment appealable by the guardian.'
>
> "Mitchell *v.* Film Transit Co., 194 Miss. 550, 13 So. (2d) 154."

While Petitioners concede the rule in Mississippi that they may not take any step if they would rely on their motion to dismiss without prejudice, an entirely different question is presented in this Court. Before this Court interferes under certiorari, it must know, from the facts, that the party seeking certiorari is entitled to rely under the facts on the Due Process Clause. Where, in order to raise a question of local practice in the State Supreme Court in accordance

with the State practice, Petitioners forewent presentation of the facts to the State court, they may not, by reason of such action, have relief in this Court, for this Court has no assurance that Petitioners have any case under the facts, especially in view of the county records, lawfully re-established, showing an absolute conveyance from N. L. Hudson to Mary E. Hudson in 1880. R. 895. Compare *Pennekamp* v. *Florida,* 328 U. S. 331, 90 L. Ed. 1295, and other cases cited.

Gulf Refining Company, hereinafter called "Gulf," most pointedly has not conceded in this record (nor do Petitioners so contend) that Petitioners had acquired the right to dismiss. Gulf has consistently contended that its cross-bill was not dismissed. This cross-bill precluded dismissal by Petitioners without prejudice without the consent of Gulf which was never given and there was no error in refusing Petitioners the right to dismiss the entire suit without prejudice. Such a dismissal would have, with deference, contravened all precedent Mississippi decisions and palpably violated Mississippi Statutes.

Petitioners vigorously complain of Gulf: (p. 9)

> "* * * Gulf's Brief goes so far as to set forth, on Page 77 of its appendix, some sort of abstract of a supposed conveyance although no record reference of the supposed conveyance is made * * *".

With deference, note Respondents' response, page 2:

> "* * * Thereto those respondents who purchased from Mary E. Hudson in fee and those claiming under such purchasers made full answer, denying title and setting up a conveyance in fee from N. L. Hudson to Mary E. Hudson in the year 1880 (Appendix "A", R. 895) * * *".

This deed is an official record lawfully established and presently existing in Jasper County, whose terms are

sought to be controverted by Petitioners who admit they have no copy of this deed, but therefor sought discovery from Respondents.

II

Petitioners say, Br. p. 10:

> "In attempting to respond to our argument concerning the tense atmosphere of the chancery court of Jasper County, Mississippi, Respondents have, as anticipated, *sought to predicate their answer on matters wholly outside the record.*"

With deference, this is respectfully denied, but if therein we offend, we are conscious that the Court will disregard, but we submit that Petitioners have definitely transgressed this rule.

1. There was no armed guard at any time present at the May Term of the Chancery Court of Jasper County, Res. Br. p. 17, *et seq.*

2. The only place wherein this letter from the Chancellor, under confidential cover, appears is (Record pages 724, 730, App. 63), when Petitioners assumed to file said alleged reasons at the May Term, whereon specifically they requested no order be entered and at which time, if an order were entered, confessedly it means, according to their concession, a termination of their point. So this letter thus then appearing could not be as a pleading and they could not introduce under it any evidence, and, as shown in our response, Br. 5, 17 *et seq.*, this letter could not be in any way a part of the record whereof either the Chancery Court, Mississippi's Supreme Court, or this Court could take any judicial notice whatever and, therefore, everything said by Petitioners as to this letter and its contents are extra the record.

3. As shown, the Chancellor could not, Mississippi's Supreme Court could not, therefore, this Court can not take any judicial action on that which is assumed to appear in the letter, because that letter is neither pleading nor proof, having never been lawfully introduced so as to become a part of the record and, therefore, all portions of Petitioners' brief having reference thereto, with deference, rely upon that which is extra the record.

4. The contention that the learned Chancellor called the May Term improperly is outside the record.

5. Please advert to the declaration of opposite counsel on page 29:

> "There is not the slightest inference anywhere that the apprehension of Petitioners arising from the threats extended to Gulf at all."

Surely therefor Gulf may not be penalized.

Petitioners say, Br. p. 11:

> "* * * which letter Petitioners made a part of the record before the chancellor".

Counsel contends that the Chancellor was misled by counsel for Respondents contending that the Chancery Court had exclusive jurisdiction and we repeat that the District Court could not possibly take jurisdiction under the decision made by the Court of Appeals in *Calcote* v. *Texas Pacific Coal & Oil Co.*, 157 Fed. 2d 216, 328 U. S. (No. 1) 29, 91 L. Ed. 80; Rehearing denied 328 U. S. (No. 1) 30, 91 L. Ed. 242. The names of the parties are shown in original cause No. 398 and when compared with those named in the suits introduced as to the complainants, the discrepancy is apparent and the diversity completely would disappear. Judge Stevens' contention, p. 13, was absolutely appropriate, but why the Chancellor ruled as he did, no one from

this record may tell further than that he refused to dismiss and thereafter, when petitioners withdrew, rendered judgment.

The contention of Gulf (p. 14):

> " 'That sought was not so in rem as to make the jurisdiction of either the State Court or the Federal Court exclusive of the other, but that these two suits could so operate, one in one court, the other in the other court, as that both in due course could be brought to final judgment. . . .' "

is substantially the same as it has been throughout. The District Court, on diverse citizenship, can never take possession of this controversy because the citizenship is not diverse. In the hearing in the District Court on September 29th, counsel for Petitioners conceded, substantially, insofar as confirmation was sought and cancellation was sought, there was lack of jurisdiction as to the realty, contending for possible jurisdiction as to discovery and personal judgment.

III

Contention is made as to invalidity by reason of the minority and military service of Claudies Newell and Paul Ellis Newell. Wars will cease and minors will attain majority and for these Petitioners to raise this question, they must show that military service and minority existed May 6, 1946. Appendix, 79. Compare *Alsworth* v. *Cordtz*, 31 Miss. 32, 36, wherein it is said:

> "It is however said, that he was then a minor, and could not bind himself any more by his silence than he could by his contract—grant it. We must presume that he had arrived at majority before judgment was recorded against him, * * *."

As counsel for these parties, the Newells, presently at the bar of this Court, we affirm in accordance with this pre-

sumption that their military service terminated before January 1, 1946, and that their minority terminated before May 6, 1946, their natal days being, Claudies Newell, March 9, 1925, and Paul Ellis Newell, July 9, 1923. Furthermore, the position of Petitioners, with deference, is so fundamentally fallacious on this score as to be ludicrous. Herein, the Hudsons—majors—sued the Newells—then minors. In this cause, at the hearing (assuming them still to be minors), the Newells appeared by their attorney and licked the Hudsons soundly and legally. That now contended is that the majors, who thus had the summons issued and the service had, having been worsted by the minors in lawful, judicial combat, may declare that combat illegal and irregular by reason of the minority of their adversary. Not so. Compare *Southern Automobile Co.* v. *Holifield,* 145 Miss. 511, 111 So. 96, 43 C. J. S., "Infants," Sec. 43, 27 Am. Jur., "Infants," Sec. 34, p. 772. Frankly, the minors alone have a right to complain and adults are bound just as though they were dealing with adults. *Harvey* v. *Briggs,* 68 Miss. 60, 8 So. 274. The disability is vouchsafed for the minor's protection and if it were potentially possible for the major thus contracting and thus judicially worsted to set up the minor's disability for the protection of the major thus worsted, it would certainly pervert and destroy the rule. Frankly, such contention is contrary to all settled adjudication.

Opposite counsel say, Br. p. 16:

> "• • • Neither denies that the rule in Mississippi is, as quoted on Page 57 of our Brief from the Mississippi cases there cited and as announced within the last year or two:
>
> " '. . . the Court will not proceed to a final decree as to any defendant until the cause is triable as to all the defendants . . .
>
> " 'Where there are several defendants, the cause is not ready for trial as to one, until ready as to all of the defendants.' "

But at the May Term, the Newells were out of the Army and both of lawful age, the court heard their counsel lawfully appearing and demanding trial. The plaintiffs could not thereof in any wise complain. Compare 31 *C. J.*, p. 1157:

> "• • • But the late infant coming of age is entitled to personally manage his own defense."

27 Am. Jur., "Infants," Sec. 117, p. 838:

> "If the infant comes of age during the pendency of the action, and continues to prosecute it, any right on his part to avoid the judgment is lost."

Surely, if these former infants had lost the right personally, their adversary claiming derivatively could not assert that which had ceased to exist.

Paepcke Leicht, etc., Co. v. *Savage,* 137 Miss. 11, 101 So. 709, in no way contravenes. Therein was sought to be set up as an adjudication a void proceeding wherein no service whatsoever, as by law required, had been had. Confessedly, that decree was a nullity.

Naught contained in *Dorsey* v. *Sullivan,* — Miss. —, 24 So. (2d) 852, contravenes ought herein contended for. Whether, by reason of the Newell minors having become adult, the court should proceed, was a question for the Chancery Court's determination and these persons as adults having therein appeared no irregularity may now be assigned. Compare *Parker* v. *Smith,* 150 Miss. 849, 117 So. 249.

Herein, the infants are claiming under this judgment and thus claiming as adults have foregone any right to disaffirm.

The case of *Dorsey* v. *Sullivan, supra,* was directly called by Petitioners to the attention of Mississippi's Supreme Court and presumptively duly considered by it.

Naught contra is found in *Parker* v. *Smith, et al.,* 150 Miss. 849, 117 So. 249, wherein the infant was sued and im-

proper return made in the justice court in which court judgment, however, was rendered for the defendant, infant. Thereupon, the plaintiff, Parker, appealed to the Circuit Court wherein the trial was *de novo* and the minor moved to dismiss on the ground that the summons had not been legally served. The court so held and this was affirmed, but in the opinion it was said:

> "* * * and that, under section 2400, Hemingway's 1927 Code, the judgment of the justice of the peace court could now be pleaded as res adjudicata. This would be true but for the appeal to the circuit court."

This case further specifically held that if the minor had been an adult and had personally appeared, such appearance would have been valid, precisely as it was when the Newells appeared at the May Term.

Naught contra is found in *New York Life Insurance Co.* v. *Bangs,* 103 U. S. 435, 26 L. Ed. 580. Therein, a non-resident infant was sued in Michigan for cancellation of a personal contract. No personal service on the infant was had and this Court followed *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. Ed. 565. However, these former infants were personally present, while adults, in Mississippi's courts through their solicitor, and so being the effect as to them is a State, not a Federal, question.

V

This did not happen. There was no such judgment. We challenge the statement, p. 24:

> "* * * It is clearly inferable that the Supreme Court of Mississippi would not have reached the conclusion it did without the presence of the Ridgway cross-bill."

But that which Petitioners consistently overlook is that this cross-bill was inherently integrated at the date of the attempted dismissal. The Gulf cross-bill did the work.

Counsel say, p. 25:

> "The Court will understand that there was never any service of this Ridgway cross-bill."

Whether there were or no, under the facts shown, is purely a State question. This particular statute is peculiar. Res. Br., p. 59:

> "'* * * but five days' notice, in writing, to the solicitor of the complainant * * * shall be sufficient * * *'." Sec. 1296, Mississippi Code of 1942.

It makes no provision that aught be filed.

No specific relief, however, was granted under the Ridgway cross-bill. The authorities cited, p. 26, are therefore inapposite. Note the decree, reciting that whereon relief was to be "and the cross-bill of Gulf Refining Company," App. 76, without reference to the Ridgway cross-bill. Note Sections 3 and 4 of the decree wherein no reference whatsoever to the Ridgway cross-bill appears, solely to that of the Gulf.

VI

Frankly, with deference, we categorically deny, p. 28:

> "As we gather Gulf's argument, it does not question at all our contention of non-compliance with this statutory scheme."

Perfect compliance, with deference, was had.

Opposite counsel contend, p. 29:

> "All of those things are based, we submit, on a complete failure to comprehend due process of law. Peti-

> tioners did not, by declining to proceed further, forfeit their right to rely on the observance of the requirements of orderly judicial procedure. Here Respondents seem to admit that orderly judicial procedure was not followed, but to argue that Petitioners had forfeited their right to rely on it."

Absolute conformity to appropriate Mississippi practice was pursued and in no way does that practice contravene the Federal Constitution.

Counsel contend, p. 30:

> "Gulf's response to Petitioners' argument (Br. P. 69) that Gulf did not resist Petitioners' Motion to Dismiss, places itself entirely on the quotation Gulf uses at the top of Page 67 of its Brief, which refers to the statement of Gulf's attorney with regard to the pendency of Gulf's cross-bill. That argument is entirely misleading."

With deference, Gulf's position is perfectly plain under this record and it has attempted to bear the burden it specifically reserved the right to assume when, having obtained protection for itself, it continued to assist those lessors from whom it obtained initially its leases at a small cost and whose rights it felt thus obligated to protect. The prior lessors, having attended and propounded that which they deemed requisite to their defense (the Gulf having protection under its lease), Gulf allowed this course to pursue, but when active proceedings were had at the May Term, confessedly, the Gulf was there and had not in any way foregone its rights precedently.

Counsel claim, p. 31:

> "There was nothing to litigate between Gulf and Petitioners because Gulf held leases both from Peti-

> tioners and Respondents. *Yet Gulf did not apprise the chancellor of that fact.* The chancellor acted, therefore, in awarding decree on Gulf's cross-bill, wholly without the benefit of the settlement which had been made between Gulf and Petitioners."

Clause of this lease, R. 755, App. 41, conclusively shows no settlement was intended but continued active litigation. At the January Term, this lease was directly called to the court's attention, Appendix 41, et seq., and reliance thereon placed. With deference, this claim is not well founded.

Petitioners claim, p. 31:

> "Surely if Petitioners had been vouchsafed the chance to answer Gulf's cross-bill, this is one available defense which Petitioners would have asserted. 'Due process requires that there be an opportunity to present every available defense.' American Surety Co. *v.* Balding, 287 U. S. 156, 77 L. ed. 231."

But Petitioners, knowing that which was to be, namely: a final hearing, voluntarily withdrew, advising the Chancellor that they would not further participate and if they intended to raise the question in the Mississippi Supreme Court under its practice, it well may be questioned whether they could have thus done, for it must be remembered that the original bill had not been dismissed and constituted, along with Gulf's cross-bill, that whereon relief was granted. Compare *Mitchell* v. *Film Transit Co., supra.* As accurately understood by Petitioners, the hearing could not have been alone on the cross-bill, but on the entire pleadings, and if Petitioners therein participated, the right to challenge was gone. Frankly, the Mississippi court could have very well held that this right was foregone when Petitioners filed their so-called protest on May 6th. The character of that protest was primarily, if not exclusively, a Mississippi question and

had Mississippi's court so thereasto held, obviously it would not be here reviewable, Petitioners under such holding having foregone the question of the improper refusal, as alleged, to dismiss without prejudice.

VIII

We deny again that the original bill had been dismissed before the May Term. Along with the cross-bill, it constituted that whereon the final hearing had to be and the hearing on the cross-bill could not delay the hearing on the undismissed original bill and had to be, under Mississippi practice, synchronized therewith. As was well known under the *Film Transit Company* case, *supra,* the original bill had to be dismissed with prejudice at that term and so was.

Counsel say, p. 33:

> "*The point here, as elsewhere, is that there is no dispute whatever about Mississippi law or its provisions.* Petitioners' contention is that they were denied due process of law by the failure of the Mississippi Courts to accord them the protection of the *rules admitted to exist.*"

With deference, Respondents deny, as found by Mississippi's Courts, that there was a failure to accord Petitioners full right in strict accordance with Mississippi's practice, and that whereof Petitioners complain is that when Petitioners invited a dismissal with prejudice, which was to them well known to be requisite, and received that dismissal with prejudice of their bill, they now seek thereat to complain after Mississippi's Supreme Court, on a ground purely local amply buttressed by uncontrovertible authorities, affirmed, leaving undetermined at least four State questions. Further, there was a determination on the facts which had been put in the record by the Respondents in such a manner as to be incontrovertible, demonstrating there never was any

such deed as by Petitioners claimed and as now appears from the public records of Jasper County. Appendix "A," Res. Br. 77, R. 895.

IX

Counsel state, p. 34:

> "The series of decisions of this Court demonstrates incontestably that due process requires that all litigants have the opportunity to contest at each step of the proceeding the contention of his adversary as those contentions are raised in obedience to recognized procedure."

Which is, in general, true, but Petitioners had these rights as demonstrated in brief for Respondents, wherein among others were cited the cases of *York* v. *Texas,* 137 U. S. 15, 34 L. ed. 604; *Hammond Packing Co.* v. *State of Arkansas,* 212 U. S. 322, 53 L. ed. 530, and many others, which are not in any way referred to and no differentiation whatsoever attempted.

Petitioners say, p. 34:

> "Petitioners stand denied a trial on the merits because they have been condemned for defaulting in a matter with which they were never faced."

But Petitioners, as they might, elected to forego the trial on the merits so that they might present to the Supreme Court of Mississippi their alleged rights denied by the Chancellor, that is, to dismiss without prejudice. Mississippi might thus lawfully require.

X

Petitioners say, p. 34:

> "It is not strange that Gulf devotes less than a page to an attempt to answer our extended argument on this

point (Br. P. 95-105) because this ruling does not affect Gulf at all."

With deference, this ruling is vital to Gulf's rights which it sought to protect so as that it might lawfully pay to its lessors the royalty rightly due them. Therefor it specifically contracted and thereto it is lawfully entitled.

Petitioners overlook the fact that under the *Film Transit Company* case, *supra,* the entire bill had to be dismissed with prejudice before Petitioners could appeal. Petitioners, with deference, concede that this dismissal with prejudice thus had to be and having been, its legal effect is the same as in any other case. The relief granted under Gulf's cross-bill did not add, with deference, one single thing to the binding effect of the final dismissal under Section 2 of the decree, according to Petitioners' claim, which reads: (Appendix 77)

> "That the complainants are not entitled to the relief prayed for nor to any relief and that the original bill and all amendments thereto be and they are hereby dismissed with prejudice."

Conclusion

Petitioners claim, p. 35:

> "A careful analysis of the briefs filed on behalf of the Respondents reveals, we submit, that it is not seriously contended that the Mississippi Courts have not committed error in the respects claimed by us."

Respondents aver that no error whatsoever occurred in any aspect in the Mississippi Courts and thus Respondents have and do now so contend.

The paraphrasing by Petitioners on page 36, with deference, is a fundamental mis-conception of respondents' claim. Respondents aver that Petitioners had no right, under Mississippi law, to dismiss without prejudice and when Peti-

tioners determined to stand on the proposition that they could thus do, they consciously overrode the decree of the Chancellor. When Petitioners applied for an interlocutory appeal to the Supreme Court of Mississippi, R. 1326, Mr. Justice Griffith definitely admonished Petitioners:

> "This matter was discussed with my associates yesterday afternoon, and it was the majority opinion, tentative of course, that (1) The Chancellor *was probably right* in refusing the dismissal, and * * *."

So that in advance of the election at the May Term, these Petitioners had the considered decision of the Chancellor and a pre-trial expression from the Supreme Court of Mississippi that the Chancellor's decision was correct and yet notwithstanding this decision of the learned Chancellor and this declaration of the Supreme Court of Mississippi, Petitioners would rather bet that they could reverse the judgment in the Supreme Court as to this procedural matter and lose their case thereby consciously than to submit their evidence to the Chancellor. With deference, their evidence must be mighty weak.

Petitioners, thus forewarned as to their inaccurate conception of Respondents' rights, subsequently judicially determined in the Supreme Court, cast caution to the winds, relying upon their unquestioned ability, they choose to endeavor to make the Supreme Court of Mississippi change its previously expressed, tentative opinion and when they therein thus failed—having refused to disclose their evidence when they had a right so to do—they cannot ask this Court to grant certiorari so that they may endeavor by parole to controvert the recorded deed, executed in 1880, whereunder Respondents' predecessors in good faith purchased from Mary E. Hudson that to her conveyed by her husband and entered into possession thereof claiming the

title thereto adversely as shown in this record for a period of almost fifty years. Certiorari does not reach such a case.

Respectfully,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 262

N. L. HUDSON ET AL.,

Appellants,

vs.

GULF REFINING COMPANY ET AL.,

Respondents

RESPONSE OF GULF REFINING COMPANY AND OTHERS TO THE PETITION FOR CERTIORARI AND BRIEF THEREON.

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INDEX

Subject Index

	Page
Response of Gulf Refining Company and others to the petition for certiorari and brief thereon	1
Preliminary statement	1
The facts as developed in the record	2
The petition should be denied under well-setled principles	8
The alleged threats relied upon as predicate for federal interposition for certiorari are non-existent in the record and in fact	17
Response to petitioners' contentions	22
Replying seriatim to the points relied upon for the issuance of the writ, said points, with our responses thereto	23
In conclusion	75
Appendix A	77
Appendix B	77
Appendix C	90
Appendix D	91
Appendix E	94
Appendix F	99

Table of Cases Cited

A. M. Klemm & Son v. *City of Winter Haven*, 309	
Adams v. *Lucedale Commercial Co.*, 113 Miss. 608 74 So. 435	36
Afro-American Sons & Daughters v. *Webster*, 172 Miss. 602, 161 So. 318	6
Alabama State Federation of Labor v. *McAdory*, 325 U. S. 450, 89 L. Ed. 1725	54
American Railway Express Company v. *Commonwealth of Kentucky*, 273 U. S. 267, 71 L. Ed. 639-641	15, 26
Angel v. *Bullington*, 91 L. Ed. 557, — U. S. —	8, 22
Armstrong v. *Jones*, 198 Miss. 627, 22 So. (2d) 7	20
Atlantic Coast Line Railroad Company v. *Glenn S. Phillips*, — U. S. —, 91 L. Ed. 1540	12

Page

Baird v. *Bardwell*, 60 Miss. 164, 169 41
Big Vein Coal Co. v. *Read*, 229 U. S. 38, 57 L. Ed. 1056 60
Bud Hall v. *Eastman-Gardiner Co.*, 89 Miss. 588, 43 So. 2 64
Blakey v. *Blakey*, 3 J. J. Marshall 674 (Ky. 1830) ... 36
Bunckley v. *Jones*, 79 Miss. 1, 29 So. 1000 20
Buckingham v. *Wesson*, (1887) 54 Miss. 526 70
Calcote v. *Texas Pacific Coal & Oil Co.*, decided July 31 1946, 157 F. (2d) 216, Certiorari denied November 18, 1946, 328 U. S. (No. 1) 29, 91 L. Ed. 80; Rehearing denied December 9, 1946, 328 U. S. (No. 1) 30, 91 L. Ed. 242 ..... 48, 59, 60
Cardos M. De Castro v. *Board of Commissioners of San Juan*, 322 U. S. 451, 465, 88 L. Ed. 1384-1391 .. 11
Carter v. *Harvey*, (1890) 7 So. 286 70
Central Land Co. v. *Laidley*, 159 U. S. 103, 40 L. Ed. 91, 95 37
Charleston Federal Savings & Loan Association v. *George P. Alderson*, 324 U. S. 182-193, 89 L. Ed. 857 15
Cole v. *Johnson*, 52 Miss. 94 64
Commonwealth Trust Co. v. *Bradford*, 297 U. S. 613, 80 L. Ed. 920 45
Dewees v. *Dewees*, 55 Miss. 315 70
Edward Hines Yellow Pine Trustees v. *Martin*, 268 U. S. 458, 69 L. Ed. 1050 31
Equitable Life Assurance Society v. *Clark*, 80 Miss. 471, 31 So. 964 ..... 26, 41
Erie R. Co. v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1493 38
Express Co. v. *Diggs*, 165 So. 292, 174 Miss. 650 59
Fay v. *New York*, — U. S. —, 91 L. Ed. 1519 12
Finklea Bros. v. *Powell*, 189 Miss. 454, 198 So. 293 .. 6
Frank L. Huddleston v. *R. H. Dwyer*, 322 U. S. 232, 88 L. Ed. 1246-1249 14
General Trading Company v. *State Tax Commission of the State of Iowa*, 322 U. S. 335-340, 88 L. Ed. 1309, 1311 11
Gillespie v. *Doty*, 160 Miss. 684, 135 So. 211 20
Guion v. *Doherty*, 43 Miss. 538 30

Page

Griffin v. *Sheffield*, 38 Miss. 359 61
Griswold v. *Simmons, et al.*, 50 Miss. 137 65
Gus Kotteakos v. *United States*, 328 U. S. 750, 90 L. Ed. 1557 16
Hambrick v. *Jones*, 64 Miss. 252, 8 So. 176 64
Hammond Packing Co. v. *State of Arkansas*, 212 U. S. 322, 53 L. Ed. 530 ..... 13, 26, 41
Hardware v. *Glidden Company*, 254 U. S. 151, 158, 76 L. Ed. 214 10
Hartford Accident & Indemnity Co. v. *Bunn*, 285 U. S. 169, 76 L. Ed. 685 75
Harris v. *Godbold*, — Miss. —, 21 So. (2d) 149 51
Illinois Central Railroad Company v. *Sanford*, 75 Miss. 862, 23 So. 355 ..... 13, 26, 41
J. Howell Flournoy v. *Samuel G. Wiener*, 321 U. S. 253, 88 L. Ed. 708-715 13
Jackson v. *Lemler*, 83 Miss. 37, 35 So. 306 35
Jarvis Ex'r v. *Interstate Coal Co.*, 257 Ky. 656, 78 S. W. (2d) 926 36
Johnson v. *Langston*, 179 Miss. 622, 176 So. 531 33
Johnson v. *Carter*, 193 Miss. 781, 11 So. (2d) 196 33
Jordan v. *Mass.*, 225 U. S. 167, 56 L. Ed. 1038 12
Kauffman v. *Wooters*, 138 U. S. 285, 34 L. Ed. 962 27
Keeton v. *State*, 197 Miss. 11, 19 So. 2d 477 45
Keegan v. *Humble Oil & Refining Co.*, 155 F. (2d) 971 48
Kelly v. *Brooks*, 57 Miss. 225 55
Kline v. *Burke Construction Company*, 260 U. S. 226, 67 L. Ed. 226, 230 ..... 44, 49
Koenig v. *Calcote*, 199 Miss. 435, 25 So. (2d) 765 ..... 32, 48
Liberty Trust Co. v. *Planters Bank*, 155 Miss. 721, 124 So. 341 46
Lott v. *Windham*, 191 Miss. 849, 4 So. 2d 342 46
Louis Buchalter v. *People of the State of New York*, 319 U. S. 427-432, 87 L. Ed. 1492-1495 15
Lyon Company v. *Karatz*, 262 U. S. 77, 67 L. Ed. 871 49
M. & O. RR. Co. v. *Holt*, 62 Miss. 170 66
Maloney v. *Tatum*, 199 So. 129, 134 So. 714 59
Market Street Railway Company v. *Railroad Commission of the State of California*, 324 U. S. 548, 89 L. Ed. 1171, 1180 ..... 16, 23

Page

McCoy v. *Watson*, 154 Miss. 307, 122 So. 368 6
McNeeley v. *City of Natchez*, 12 F. (2d) 3, cert. den. 47 S. Ct. 767, 71 L. Ed. 1339 61
Merrill Engineering Co. v. *Capital National Bank*, 192 Miss. 378, 5 So. (2d) 666 33
Merrill Engineering Co. v. *Capital National Bank*, 192 Miss. 378, 5 So. (2d) 666 ..... 33, 48
Milwaukee Electric Ry. v. *Wisconsin*, 257 U. S. 100, 64 L. Ed. 476, 480 15
Mitchell v. *Film Transit Co.*, 194 Miss. 550, 13 So. (2d) 154 23
Miss. Cottonseed Products Co. v. *Champion*, — Miss. —, 29 So. (2d) 684 59
Mobile and Kansas City RR. Co. v. *Turnipseed*, 219 U. S. 35, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226 66
Moore v. *Pate*, 39 F. (2d) 616, certiorari denied 282 U. S. 853, 75 L. Ed. 753 ..... 44, 49
Muhlker v. *N. Y. & H. R. Co.*, 197 U. S. 544, 49 L. Ed. 872 38
N. O. G. N. RR. Co. v *Waldern*, 133 So. 241, 160 Miss. 102 66
Neblett v. *Carpenter*, 305 U. S. 302, 83 L. Ed. 182, 187 37
Neblett v. *Samuel L. Carpenter*, 305 U. S. 297-305, 83 L. Ed. 183-187 15
Newman v. *Mackin*, 13 Smedes & M. 383 61
Opp Cotton Mills, Inc. v. *Administrator*, 312 U. S. 126, 85 L. Ed. 624 27
Peeples v. *Boykin*, 132 Miss. 359, 96 So. 177 42
Pennekamp v. *Florida*, 328 U. S. 331, 90 L. Ed. 1295-1303 11
Phoenix Insurance Co. v. *Smith*, 95 Miss. 352, 48 So. 1020 70
Pierce Oil Corp. v. *Phoenix Refining Co.*, 259 U. S. 125, 66 L. Ed. 855, 858 28
Posey v. *Bank of Philadelphia*, 92 So. 840, 130 Miss. 530, 95 So. 134, 130 Miss. 825 54
Prince v. *Commonwealth of Massachusetts*, 321 U. S. 158-178, 88 L. Ed. 645-651 10
Rescue Army v. *Municipal Court of the City of Los Angeles*, 91 L. Ed. 1221, 1233, — U. S. — 8

Page

Russell v. *Denson*, 98 Miss. 859, 54 So. 439 36
Sage Stores Company v. *State of Kansas ex rel. A. B. Mitchell*, 323 U. S. 32-36, 89 L. Ed. 25 10
Saunder v. *Shaw*, 244 U. S. 317, 61 L. Ed. 1163 72
Shapleigh v. *Mier*, 299 U. S. 468, 81 L. Ed. 355, 359 .. 20
Simpson v. *Ricketts*, 185 Miss. 280, 186 So. 318 33
Sivley v. *Summers*, 57 Miss. 712, 730 74
Smith v. *Moore*, 3 How. 40, 42 19
Snyder v. *Massachusetts*, 291 U. S. 674, 677, 78 L. Ed. 674 10
Soria v. *Stowe*, 66 Miss. 615, 6 So. 317 55
Spector Motor Service v. *Charles J. McLaughlin*, 323 U. S. 101-106, 89 L. Ed. 101 9
Stokely v. *State*, 149 Miss. 435, 115 So. 563 48
Texas v. *White*, 154 U. S. 519, 520, 38 L. Ed. 1084 21
Tot v. *U. S.*, and *U. S. of America* v. *Delia*, 319 U. S. 463, 87 L. Ed. 1519 66
Toucey v. *New York Life Ins. Co.*, 314 U. S. 118, 86 L. Ed. 100 45
Tracy v. *Ginzberg*, 205 U. S. 170, 51 L. Ed. 755, 759 .. 15, 57
Trust Co. v. *Fitzpatrick*, 71 Miss. 347, 14 So. 270 36
U. S. 638, 84 L. Ed. 433, 993 37
U. S. v. *Johnson*, 327 U. S. 106, 90 L. Ed. 562, 566 .... 62, 63
U. S. v. *Petrello*, 91 L. Ed. 1403 12
United States v. *William R. Johnson*, 327 U. S. 106, 90 L. Ed. 562, 566 17
United States Alkali Export Association v. *United States*, 325 U. S. 196, 89 L. Ed. 1554 ..... 23, 46
Universal Life Ins. Co. v. *Keller*, 197 Miss. 1, 17 So. (2d) 797 46
Vaughan v. *Hudson*, (1882) 59 Miss. 421 70
Veal v. *Thompson*, 138 Tex. 341, 159 S. W. (2d) 472 .. 48
William Greenough v. *Tax Assessors of the City of Newport*, — U. S. —, 91 L. Ed. 1274, 1277 11
Y. & M. V. R. R. Co. v. *Adams*, 77 Miss. 765, 779 45
Yakus v. *United States*, 321 U. S. 414, 88 L. Ed. 834 .. 28
York v. *Texas*, 137 U. S. 15, 34 L. Ed. 604, 605 27

Statutes Cited

	Page
Annotation, 144 A. L. R. 372	26, 41
Broom's Legal Maxims, 165, 951	21
Broom's Legal Maxims, 268	27
Broom's Legal Maxims, p. 252	64
Code of 1880, Section 1722	31
Code of 1857, Chapter 61, Art. 160	31
Griffith's Chancery Practice, Section 262	64
Griffith's Chancery Practice, Sections 538 and 562	41
Judicial Code Section 265	45
Mississippi Code of 1942, Section 1539	29
Section 310 of Griffith's Chancery Practice	63
Sec. 380, p. 385, of his Chancery Practice	70
Section 595 of the Code of 1930	30
Section 803, Code of 1906	30
Section 642, Code of 1871	31
Section 741, Code of 1892	30
Section 1148, Mississippi Code, 1942	46
Section 1289 of the Mississippi Code	63
Section 1988, Code of 1943	54
Section 3404, Code of 1930	54
4 C. J. S., 61; 2 Am. Jur., 847	45
17 Am. Jur., Sec. 7, p. 61	36
13 West Publishing Co. Digest, Title "Tender," Key No. 24	30
20 Am. Jur., "Evidence," Sec. 52, p. 52	20
28 U. S. C. A., Rule 38, Page 156	8
28 U. S. C. A., Section 344, Page 96	14
28 U. S. C. A., Section 391	16
31 C. J. S., "Evidence," Sec. 11, p. 516	20
32 Am. Jur., p. 118; 35 C. J., p. 1239	33
131 A. L. R. 258	20

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 262

N. L. HUDSON ET AL.,

Appellants,

vs.

GULF REFINING COMPANY ET AL.,

Respondents

RESPONSE OF GULF REFINING COMPANY AND OTHERS TO THE PETITION FOR CERTIORARI AND BRIEF THEREON.

I

Preliminary Statement

With deference, this is the most extraordinary application for certiorari, both under the law and as to the facts, whereunto we have ever assumed to answer. It is so unusual that we feel the safest course to pursue is to challenge in its entirety that assumed to be claimed, averring with confidence that naught occurred which petitioners do not concede should have properly happened.

II

The Facts as Developed in the Record

An original bill was filed in the Chancery Court of the First District of Jasper County, Mississippi, by the petitioners on June 10, 1944, claiming title to some 360 acres of land in said County and State under an alleged deed from N. L. Hudson to Mary E. Hudson, his wife, alleged to have conveyed to her a life estate with remainder at her death to grantor's heirs. The original bill shows the death of N. L. Hudson in 1895, and thereafter the disposition of the said lands in fee by Mary E. Hudson to those under whom respondents claim, such persons paying therefor value and entering into the possession thereof, which possession, however, was asserted by petitioners to be of the life estate only of Mary E. Hudson and that possession after her death by respondents was as tenants at sufferance of the petitioners who claim to be the owners of the remainder in fee after the death of Mary E. Hudson. Petitioners did not have possession of the alleged deed from N. L. Hudson to Mary E. Hudson, and no such deed is of record. Petitioners made defendants 106 persons and corporations, including Gulf Refining Company. Gulf Refining Company was joined in the suit as the holder of oil, gas and mineral leases on the lands involved or a large part thereof, which leases petitioners sought to cancel. Petitioners sought the cancellation of all conveyances, including leases to all the respondents, with the confirmation of the title which they claimed to have under the deed from N. L. Hudson to Mary E. Hudson. Thereto those respondents who purchased from Mary E. Hudson in fee and those claiming under such purchasers made full answer, denying title and setting up a conveyance in fee from N. L. Hudson to Mary E. Hudson in the year 1880 (Appendix "A" hereto, R. 895)

together with adverse possession for a period much in excess of ten years, plus estoppel and laches. Gulf Refining Company filed a detailed answer denying *seriatim* the allegations of the bill of complaint, and made its answer a cross bill and prayed for the confirmation of its leases from the parties in possession of and claiming to own the fee title interest in the lands. Petitioners appeared to the cross bill and filed a demurrer thereto.

Thereafter on December 15, 1944, for $50,000 cash paid to them by Gulf Refining Company, petitioners executed to respondent Gulf Refining Company a so-called protective lease (Appendix "B" hereto) wherein clause 14 provides (Appendix 53):

> "And, further, notwithstanding any provisions of this lease apparently to the contrary, it is agreed and understood that Lessor shall not be entitled to and Lessee shall be under no obligation to pay Lessor any of the royalties, or any part thereof, provided for herein unless and until in the suit entitled N. L. Hudson, et al., complainants, *v.* The Gulf Refining Company, et al., defendants, No. 398, Chancery Court for the First Judicial District, Jasper County, Mississippi, lessor shall have established by a compromise settlement between the parties thereto, or by final decree of the court therein, that the lessor herein is the owner of the lands and minerals hereby leased and involved in said suit or the owner of an interest therein."

In such lease it is also provided that Gulf Refining Company receives and retains its full right to litigate with the petitioners and to contend notwithstanding the protective lease that all its existing leases were valid and paramount leases. Note the precise language (Appendix 51) as follows:

> "It is further expressly agreed that Lessee has accepted and does accept this lease from Lessor not in

recognition of the title or claim asserted by Lessor, but it has accepted and does accept this lease solely for the purpose of buying its protection to the title or titles to the land covered hereby, together with all the oil, gas and other minerals thereunder, or that may be or have been produced from said land under the terms of the hereinabove mentioned leases; and Lessee shall never be called upon to recede from its position that it now has and owns valid mineral leases covering all of said lands; and it shall be just as free hereafter as it has been heretofore to assert that its Lessors named in this paragraph have and had good and valid titles to the whole of the lands covered hereby and to all of the oil, gas and other minerals thereunder at the respective dates of execution of said leases; and it is further agreed that the continued assertion of such contention by Lessee (R. 765) shall in no manner be deemed or construed a repudiation of the terms of this lease."

Pursuant thereto development of the oil field was had with the accrual of large royalty but with the distribution stayed by reason of this litigation. Shortly thereafter this protective lease was executed. Additional counsel were procured by petitioners, who at once, according to his testimony in suit 270 *et al.* in the District Court of the United States, conceived that a transfer should be had from the State Court to the Federal Court. On December 12, 1945, petitioners filed a motion in the Chancery Court of the First District of Jasper County in said cause #398 (Appendix 30) reading as follows:

> "Come the complainants by their attorneys and move the court to dismiss this suit without prejudice at the cost of the complainants, which costs are tendered herewith."

Thereto, by certain respondents, specific written objections were interposed, though no response in writing was required under the state practice. Gulf Refining Company

filed no written response (Appendix 30-41). At the January Term 1946 of the Chancery Court of First District of Jasper County, Mississippi, the cause was heard solely on petitioner's motion to dismiss, which was taken under advisement by the court for decree in vacation, and overruled by the court on the 18th of January, 1946 (Appendix 63). On the hearing of the aforesaid motion to dismiss petitioners introduced substantially naught but the complaints which they had filed in the District Court of the United States in Cause #270, 271, 272 and 278, predicating their position solely upon those suits thus brought. There was no allegation nor any proof of any threats submitted to the court or called to the court's attention on such hearing. An interlocutory appeal from the said order of the Chancery Court of Jasper County, Mississippi, overruling the motion to dismiss without prejudice was properly denied both by the Chancellor and later by a Judge of the Supreme Court of Mississippi after conference with his fellow justices.

Due to there being only twelve days of court per year in the First District of Jasper County, Mississippi, when oil was therein discovered the court became congested and having so been the Chancellor called a special term to be held the first Monday of May of 1946, having at that time a period during which he was not engaged in other courts. Unquestionably the Chancellor assumed to write the letter (shown Appendix "C") which he transmitted to counsel asking that it be treated as confidential. Thereafter when court convened on May 6th the respondents attended. There were absolutely no deputies present and naught out of the ordinary occurred. We make this statement in accordance with the record wherein at Appendix page 75 it is said by the court:

> "I understand you all agree it is not necessary to enter any order on the allegations in the exceptions

with reference to the threats, that this court cannot protect its litigants and solicitors."

At that term, petitioners appeared by their counsel and fearing that rule that there were no special appearances in Mississippi, *McCoy* v. *Watson*, 154 Miss. 307, 122 So. 368; *Afro-American Sons & Daughters* v. *Webster*, 172 Miss. 602, 161 So. 318; *Finklea Bros.* v. *Powell*, 189 Miss. 454, 198 So. 293, filed a so-called protest whereon no order was asked and whereasto no evidence was offered and having thus done, the petitioners' counsel declaring their purpose said (Appendix 72 & 75):

> "It is not a motion, it is an objection to proceeding in the case. Our sole purpose is to present this objection to Your Honor.
>
> • • • • • • •
>
> *"It is our contention when our motion was made to dismiss this Court was divested of jurisdiction.* This objection is interposed to re-affirm that position, make clear to Your Honor what the purpose is. (Italics ours)
>
> • • • • • • •
>
> "Complainants are still standing on their objection and in doing so we beg leave to respectfully withdraw from the court room."

Thereafter, respondents made due proof and having thus done a final decree was entered in the form of Appendix "D" hereto, the most pertinent portions of the decree being (Appendix 76):

> "This cause coming on this day to be heard on original bill and amendments thereto, answers of all of the defendants thereto, and the cross-bill of Gulf Refining Company as against complainants as cross-defendants and general demurrer of cross-defendants to said cross-bill, and proof, came the parties complainant by their attorneys and filed herein written

objections to the jurisdiction of the court to try this case, but asked for no order to be entered thereon; and all of the defendants announcing ready and demanding trial; and the Court being of the opinion that the court has jurisdiction to try this cause at this term, and there being no motion for or grounds for a continuance of the said cause, announced that the trial thereof should proceed;

"Whereupon the attorneys for complainants announced to the Court that they would not proceed with or take part in any trial of the cause but would withdraw from the courtroom which they then and there did;

"Thereupon the defendants offered evidence in open court to sustain their defenses to the original bill and amendments and evidence to sustain the allegations of the cross-bill of Gulf Refining Company; and the Court having heard and considered the pleadings, and the proof, doth now find, order, adjudge and decree from the pleadings and the competent proof as follows:

1

"That this Court has jurisdiction to adjudge and decree in the manner and form as it now does, *and does not recognize the right of complainants to withdraw as was wrongfully done, the Court* (R. 749-B) *reaffirming the Court's prior ruling refusing to allow a dismissal of said cause without prejudice by decree heretofore entered in said cause.* (Italics ours)

2

"That the complainants are not entitled to the relief prayed for nor to any relief and that the original bill and all amendments thereto be and they are hereby dismissed with prejudice." • • •

Therefrom, an appeal was taken to the Supreme Court of Mississippi where the decree of the Chancery Court was affirmed, a copy of the opinion is Appendix "E" hereto.

Thereupon, petitioners suggested error, which suggestion was overruled on May 19, 1947, Appendix 82. Later, motion to correct was denied. Thereto certiorari from this Court is sought.

III

The Petition Should be Denied Under Well-Settled Principles

With deference to petitioners, this writ should be refused upon well-settled principles, which we epitomize and submit.

1. Reviewing by certiorari is not a matter of right, but of grace. *Angel* v. *Bullington*, 91 L. Ed. 557, — U. S. —. 28 U. S. C. A., Rule 38, Page 156, provides:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Rescue Army v. *Municipal Court of the City of Los Angeles*, 91 L. Ed. 1221, 1233, — U. S. —:

> " 'the Court has developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' • • • if the record presents some other ground upon which the case may be disposed of; • • •.
>
> "Some if not indeed all, of these rules have found 'most varied applications.' And every application has been an instance of reluctance, indeed of refusal, to undertake the most important and the most delicate of the Court's functions, notwithstanding conceded jurisdiction, until necessity compels it in the performance of constitutional duty. • • •
>
> "If government is to function constitutionally, for each to keep within its power, including the courts; the

inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system.

"All these considerations and perhaps others, transcending specific procedures, have united to form and sustain the policy. Its execution has involved a continuous choice between the obvious advantages it produces for the functioning of government in all its coordinate parts and the very real disadvantages, for the assurance of rights, which deferring decision very often entails. On the other hand, it is not altogether speculative that a contrary policy, of accelerated decision, might do equal or greater harm for the security of private rights, without attaining any of the benefits of tolerance and harmony for the functioning of the various authorities in our scheme. For premature and relatively abstract decision, which such a policy would be most likely to promote, have their part too in rendering rights uncertain and insecure."

2. Decision of constitutional question must necessarily be made. *Spector Motor Service* v. *Charles J. McLaughlin*, 323 U. S. 101-106, 89 L. Ed. 101:

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality— • • • unless such adjudication is unavoidable."

Confessedly, Mississippi's Supreme Court pretermitted deciding any Federal question, founding its affirmance solely upon local statutes and decisions as to cross-bills, leaving undecided, however, many of the local questions, all of which must have been precedently determined before invasion of constitutional rights could occur.

3. State law—statutory and decisions—normally controls. *Prince* v. *Commonwealth of Massachusetts*, 321 U. S. 158-178, 88 L. Ed. 645-651 (Syllabus 2):

> "A State's Court construction of a state statute is not reviewable in the Supreme Court of the United States."

Sage Stores Company v. *State of Kansas ex rel. A. B. Mitchell*, 323 U. S. 32-36, 89 L. Ed. 25:

> "• • • The coverage of the Kansas statute is a matter solely for the determination of Kansas."

Hardware v. *Glidden Company*, 254 U. S. 151, 158, 76 L. Ed. 214:

> "• • • it suffices to say that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The 14th Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. See Missouri ex rel Hurwitz *v.* North, 271 U. S. 40, 70 L. Ed. 818, 46 S. Ct. 384. In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard."

Snyder v. *Massachusetts*, 291 U. S. 674, 677, 78 L. Ed. 674:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. (Citing a long list of cases) Its procedure does not run foul of the Fourteenth

Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar."

General Trading Company v. *State Tax Commission of the State of Iowa*, 322 U. S. 335-340, 88 L. Ed. 1309, 1311:

"The application by that Court of its local laws and the facts on which it founded its judgment are of course controlling here."

Cardos M. De Castro v. *Board of Commissioners of San Juan*, 322 U. S. 451, 465, 88 L. Ed. 1384-1391:

"But the principle which these phrases were intended to express has not been more accurately and comprehensively stated than by Mr. Justice Holmes in words which are completely applicable to the present case, in Diaz *v.* Gonzales y Lugo, supra (261 U. S. 105, 106. 67 L. Ed. 551, 552, 43 S. Ct. 286):

" 'This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern."

Pennekamp v. *Florida*, 328 U. S. 331, 90 L. Ed. 1295-1303:

"While the ultimate power is here to ransack the record for facts in constitutional controversies, we are accustomed to adopt the result of the state court's examination. It is the findings of the state courts on undisputed facts or the undisputed facts themselves which ordinarily furnish the basis for our appraisal of claimed violations of federal constitutional rights."

William Greenough v. *Tax Assessors of the City of Newport*, — U. S. —, 91 L. Ed. 1274, 1277:

"All questions of state procedure and of the applicability of the state statute to the resident trustee in the circumstances of this case were foreclosed for us by the rulings of the Supreme Court of Rhode Island."

U. S. v. *Petrello*, 91 L. Ed. 1403; *Atlantic Coast Line Railroad Company* v. *Glenn S. Phillips*, — U. S. —, 91 L. Ed. 1540:

> "But while it is true that we are not bound by the construction of local statutes by the local courts in deciding the Constitutional question, 'yet when we are dealing with a matter of local policy, like a system of taxation, we should be slow to depart from their judgment, if there was no real oppression or manifest wrong in the result.'" (Authorities)

Petitioners thoroughly understood the rule in Mississippi that when the Chancellor declined to dismiss without prejudice, petitioners could reach the Supreme Court only after a final decree and affirmatively elected to have a decree dismissing with prejudice so that they might therefrom thus appeal and when they so did, the sole questions presented were those arising primarily under the local law whereasto Mississippi's decision was controlling.

4. Hearing in Mississippi Court constitutional. There is no pretense but that the Chancellor and the Judges of the Supreme Court were unbiased and would have vouchsafed as to the merits a fair decision. So being, due process existed. *Jordan* v. *Mass.*, 225 U. S. 167, 56 L. Ed. 1038:

> "Due process implies a tribunal both impartial and mentally competent to afford a hearing. But to say that due process is denied when a competent state court refuses to set aside the verdict of a jury because the sanity of one of its members was established by only a preponderance of evidence would be to enforce exaction unknown to the precedents of the past, and an interference with the discretion and power of the state not justified by the demands of justice, nor recognized by any definition of due process."

Compare *Fay* v. *New York*, — U. S. —, 91 L. Ed. 1519. Herein consciously, in order to test the sufficiency of the

ruling of the Chancellor forthwith, petitioners forewent their hearing on the merits amply and adequately provided for under Mississippi's law and having thus done, may not herein complain when that by Mississippi's Court done was exactly that which petitioners, as to the Chancery Court, expected and as to the Supreme Court should have expected.

5. When petitioners voluntarily withdrew, being nonresidents of Mississippi, the Mississippi Court had plenary power, in virtue of such withdrawal alone, to render a final judgment of dismissal with prejudice. *Hammond Packing Company* v. *Arkansas,* 212 U. S. 322, 53 L. Ed. 531, 144 A. L. R. Note, page 372; *Illinois Central Railroad Company* v. *Sanford,* 75 Miss. 862, 23 So. 355.

Thus, strictly speaking, petitioners, by their course of conduct, effectively, at Mississippi's Court's election, would have precluded themselves from asserting even any State question.

6. When petitioners' counsel, being well acquainted with Mississippi practice, voluntarily withdrew so that an appealable final decree might be entered, it was incumbent upon Mississippi's Supreme Court on that appeal adversely to determine a Federal question, otherwise this Court would be without jurisdiction. *J. Howell Flournoy* v. *Samuel G. Wiener,* 321 U. S. 253, 88 L. Ed. 708-715:

> "The cause is accordingly dismissed for want of jurisdiction. In the view we take of the case we do not reach the question whether the appeal should not also be dismissed because of doubt whether the decision of the Louisiana Supreme Court as to Act No. 119 rests on a holding that the Act violates the Fourteenth Amendment, or merely that it is inapplicable as a matter of construction of a state statute not reviewable here. *With that left in doubt, we could not say*

that the decision of the state Supreme Court does not rest on a non-federal ground adequate to support it."

Herein, Mississippi's Court affirmed upon one point—the efficacy of a cross bill properly filed. Compare Annotation, 28 U. S. C. A., Section 344, Page 96, stating the well established rule thus:

> "To secure review by the federal Supreme Court of a decision of a state court on certiorari, the necessary prerequisite is exemplification of a federal question that was affirmatively presented, that its decision was necessary to the determination of the cause, that it was actually decided or that judgment as rendered could not have been so without deciding it. Williams *v.* Keyes, Fla. 1939, 186 So. 250."

Mississippi may alter its rules of decision and of practice at pleasure. While we specifically deny that Mississippi's Court thus did, yet thereasto this Court has said: (*Frank L. Huddleston* v. *R. H. Dwyer,* 322 U. S. 232, 88 L. Ed. 1246-1249):

> "It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision. Meredith *v.* Winter Haven, 320 U. S. 228, ante, 964, S. Ct. 7. And a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones. 'Until such time as the case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with *the then* controlling decision of the highest state court'. Vandenbark *v.* Owens-Illinois Glass Co., 311 U. S. 538, 85 L. Ed. 327, 330, 61 S. Ct. 347."

The Fourteenth Amendment does not transform the erroneous determination of a question of local law into a violation of the Fourteenth Amendment. *Milwaukee Electric Ry.* v. *Wisconsin*, 257 U. S. 100, 64 L. Ed. 476, 480:

> "But, however that may be, the 14th Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions, (Backus Jr. & Son *v.* Fort Street Union Depot, 169 U. S. 557, 569, 42 L. Ed. 853, 859, 18 Sup. Ct. Rep. 445), any more than, in guaranteeing due process, it assures immunity from judicial error (Central Land Co. *v.* Laidley, 159 U. S. 103, 40 L. Ed. 91, 16 Sup. Ct. Rep. 80; Tracey *v.* Ginzberg, 205 U. S. 170, 51 L. Ed. 755. • • •"

American Railway Express Company v. *Commonwealth of Kentucky*, 273 U. S. 267, 71 L. Ed. 639-641:

> " 'The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law.' Enterprise Irrig. Dist. *v.* Farmers Mut. Canal Co., 243 U. S. 157, 165, 166, 61 L. Ed. 644, 649, 37 Sup. Ct. Rep. 318. It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law."

Compare *Tracy* v. *Ginzberg*, 205 U. S. 170, 51 L. Ed. 755; *Neblett* v. *Samuel L. Carpenter*, 305 U. S. 297-305, 83 L. Ed. 183-187; *Louis Buchalter* v. *People of the State of New York*, 319 U. S. 427-432, 87 L. Ed. 1492-1495. *Charleston Federal Savings & Loan Association* v. *George P. Alderson*, 324 U. S. 182-193, 89 L. Ed. 857:

> Headnote 9. "Nor does the equal protection clause prohibit inequality in taxation which results from mere mistake or error in judgment of tax officials."

Market Street Railway Company v. *Railroad Commission of the State of California,* 324 U. S. 548, 89 L. Ed. 1171, 1180:

> "A misapprehension by a litigant of the steps which its best interests require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance, but it is not grounds for our interference as a denial of constitional rights."

7. So far as Federal rights are concerned, there could be naught herein other than harmless error. Compare 28 U. S. C. A., Section 391:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. (R. S. Section 726, Mar. 3, 1911, c. 231, Section 269, 36 Stat. 1163; Feb. 26, 1919, c. 48, 40 Stat. 1181)."

Herein, Mississippi's Court, on appeal, never went beyond the effect of a cross bill. It dealt with no other or further question and as to the effect of a cross-bill, this Court was, with deference, powerless, as that matter was one strictly for local determination. So being, therefore, at most that which could have herein occurred was "harmless error", there being divers State questions existent before the Federal Constitution could have been in any wise reached. Compare *Gus Kotteakos* v. *United States,* 328 U. S. 750, 90 L. Ed. 1557.

8. Frankly, at most, that determined by the State Court involved not questions of law so much as questions of fact.

So being, certiorari did not lie. Compare *United States* v. *William R. Johnson*, 327 U. S. 106, 90 L. Ed. 562, 566:

> "Under that Rule the Circuit Court of appeals here, after studying the issues raised, and upon determining that the only objection was to the trial court's findings on conflicting evidence, should have decided that this does not present a reviewable issue of law and on its own motion have dismissed the appeal as frivolous."

9. But if it be that this Court should feel that this Writ cannot be under the above authorities denied, then we, with deference, submit

IV

The Alleged Threats Relied Upon as Predicate for Federal Interposition for Certiorari Are Nonexistent in the Record and in Fact.

There is much said and much more innuendo as to what petitioners are pleased to call "threats and intimidation". We wish to state, frankly, to this Honorable Court, without fear of successful contradiction, that there is in this immense record not one scintilla of evidence and no reference to any such alleged threats save those vague statements made in petitioners' argument which, it is submitted, are calculated to mislead this Honorable Court into thinking, contrary to the fact, that petitioners and their counsel and witnesses were in this most unusual manner denied the equal protection of the law.

Petitioners did not have the temerity to present any allegation of threats in any action in the Chancery Court. As a matter of fact, counsel for petitioners had determined on their course of procedure in the Chancery Court long prior to the time the Chancellor wrote his letter asking for

suggestions with respect to what he had heard but of which he disclaimed any knowledge whatever.

In their motion to dismiss (Appendix, p. 30), petitioners made no mention of any fear of danger on their part. In their "protest and objection" filed and presented by petitioners' counsel in person on the very day this cause was called for trial by the Chancellor, there was a reference to the fact that a trial could be had in the Federal Court in an atmosphere free of threats and intimidations. There is no allegation or intimation that the same free atmosphere did not exist in the Chancery Court.

If petitioners believed, which, with deference, we aver they did not, that things were so bad they could have made a motion for continuance or possibly for a change in venue. The fact that no such motion was made is indicative that the petitioners knew there was no ground therefor.

Therefore, threats did not constitute an integral element of the rights which petitioners assumed to assert when this cause was heard. At the January Term, 1946, petitioners were present in force and introduced under this motion all evidence by them deemed appropriate. Appendix 61, 62. And in this evidence there is no threat mentioned. Thereafter, when Petitioners sought interlocutory appeal to the State Supreme Court to vindicate their assumed right of absolute dismissal without prejudice at their election, they did not assume to present to the Supreme Court of Mississippi any alleged threats of any kind or character.

Now, the Chancellor on his own responsibility, insofar as this record shows, having a vacant period in May, called a special term of the Chancery Court and intended presumptively to clear the congested docket then existent. At that time, without procuration, sofar as this record discloses,

of any person the Chancellor wrote his personal, confidential letter. Therein that said was (Appendix 63):

> "It has come to my knowledge that certain parties interested in the case have made threats against certain litigants, witnesses and attorneys. Of course, I have no personal knowledge that any such threats have been made. But it is my duty, as I see it, to see that all officers of the court, litigants and witnesses are protected."

Whereasto, consider:

1. Carefully analyze the letter of the Chancellor. He recites in the past tense the calling of the term and his authority to act, and then says: "I am directing the sheriff to appoint" and concludes with a request for suggestions. The Chancellor may not lawfully act save by an order appropriately spread upon the minutes of the court. No such order at any time was made and does not at any place appear of record and that herein asked is for this court to assume that the Chancellor did that whereof there is no record, which he did not do, and whereasto he asked suggestions, presumptively pursuant to such suggestions he found the course initially suggested as inappropriate.

2. There is no showing whether these threats were made by complainant or defendant and if they were made by defendant, there is no showing which of these more than 100 persons made such threat, how, when or where. Under settled Mississippi law any personal knowledge upon the part of the court cannot form the predicate of judicial action but must be integrated into the record in such shape that the law will recognize. As early as *Smith* v. *Moore*, 3 How. 40, 42, Mississippi's Supreme Court said:

> "But he cannot give a judgment upon his private knowledge; for he is obliged to give it according to law and what is proved."

Compare *Gillespie* v. *Doty*, 160 Miss. 684, 135 So. 211, wherein petitioners were directly admonished if they desire to utilize that known by the Judge, it was requisite that he be sworn as a witness. So knowing, they consciously refused to utilize him. Therefrom, we deduce that his evidence as given could not have been in any way satisfactory to them. Compare *Bunckley* v. *Jones*, 79 Miss. 1, 29 So. 1000. Compare, also, *Armstrong* v. *Jones*, 198 Miss. 627, 22 So. 2d 7; 20 Am. Jur., "Evidence", Sec. 52, p. 52; 31 C. J. S., "Evidence", Sec. 11, p. 516; 131 A. L. R. 258. So that what the Judge knew, if he knew anything adverse to respondents, and petitioners desired to rely thereon, their obligation was plain. They have not integrated that requisite into this record.

But we desire to advert to the fact that at the May Term, petitioners were present by counsel and were directly asked by the Chancellor as to that which they desired to do in this regard, whereunto the record shows the response was (Appendix 75):

> "I understand you all agree it is not necessary to enter any order on the allegations in the exceptions with reference to the threats, that this Court cannot protect its litigants and solicitors.
>
> "I will proceed with the trial of the case."

And this Court has adopted the fundamental maxim of Broom: page 163 "*De non apparentibus et non existentibus, eadem est ratio.*" Compare *Shapleigh* v. *Mier*, 299 U. S. 468, 81 L. ed. 355, 359.

This Court will recollect in the early days the opinion of the higher State courts was not a part of the record and might not be adverted to for jurisdiction, even though appearing. Furthermore, the final decree specifically covered this wilful withdrawal and specifically found that

there was no motion for a continuance and no ground therefor. Appendix 76.

Further, petitioners did not make a motion for a change of venue, if that might have been granted. Against these alleged threats, by whom, not shown, the extent of which are totally undisclosed, and their extent not made apparent by petitioners whose duty it was thus to do, related solely to the proceedings in the State Court and as such might constitute an offense against not the United States but the State of Mississippi wherein rectification should be. Furthermore, the weight of that thus done would have overborne completely respondents if they had dared to be guilty thereof. No sane litigant would for a moment tolerate the insufferable obstacle upon his cause cast by such a course of conduct and we appeal to the maxim "*Omnia praesumuntur rite et solenniter esse acta*", Broom's Legal Maxims, 165, 951. No claim could thus be presumed, nor an intolerable burden on respondents would be presumed.

But if, for the sake of argument, all be admitted as to threats, still such threats so thus existent (and we do protest solemnly they were not existent) do not constitute, when committed by a litigant, any act of the State of Mississippi, and it is a condition precedent to the application of the Fourteenth Amendment that the act should be by the State. Mississippi is sovereign in this aspect and her acts thereasto, with deference, are adequate to protect petitioners who, under this record, have no right to stamp the judicial proceedings, wherefrom they voluntarily withdrew, as contrary to the Constitution. Compare *Texas* v. *White,* 154 U. S. 519, 520, 38 L. Ed. 1084.

That whereasto jurisdiction here is sought is broader than the Fourteenth Amendment, and the Fourteenth Amendment did not contain within its ambit rectification by this court of all wrongs by individuals committed. When

circumscribed to state action, the burden cast on this Court is amply adequate, but if extended to requiring that rectification be wrought when predicated upon improper individual action, the burden would be intolerable. The States and their courts would pass into innocuous desuetude.

3. Under the rules of this Court, whereunder certiorari may be granted as of grace, *Angel* v. *Bullington*, —U. S.—, 91 L. Ed. 557, with deference, we submit alleged threats, not validly integrated into the record, furnish no possible predicate as both the Chancery Court and the Supreme Court of Mississippi have found as a fact, as we interpret their opinions, these to be nonexistent to an extent that would in any way impair petitioners rights.

V

Response to Petitioners' Contentions

Appropriately, petitioners' counsel concede (Br. p. 14):

> "Since the moment they filed their Motion to Dismiss without prejudice, Petitioners have placed their sole reliance on the Constitutional Rights they asserted at every stage of the State Court proceeding. Neither the trial court nor the Supreme Court of Mississippi noticed or referred to the Federal questions raised and apparently neither court gave these Federal questions any consideration whatever."

And assume to imply a conscious disregard of alleged constitutional rights by Mississippi's courts. With deference, fundamental error is thus committed. We challenge petitioners' statements both of fact and law when inconsistent with that here declared and these inconsistencies are developed when we make reference to the points whereon we rely. Certiorari should not, under well-settled general principles, be herein granted, petitioners having voluntarily with-

drawn from the court according to their concession in order that they might effectively appeal under settled Mississippi practice, *Mitchell* v. *Film Transit Co.*, 194 Miss. 550, 13 So. 2d 154, and thereby test the rightfulness of their contention that they might dismiss without prejudice, the Mississippi practice forbidding piecemeal appeals, *United States Alkali Export Association* v. *United States*, 325 U. S. 196, 89 L. Ed. 1554, and in order to obtain such appeal from a final judgment, petitioners forewent their right to a hearing on the merits. Compare *Market Street Railway Co.* v. *Railroad Commission of the State of California*, 324 U. S. 548, 89 L. Ed. 1172. Especially when, as here, the State Supreme Court affirmed solely upon a construction of its local practice leaving undetermined many other local questions upon which it might validly have affirmed the Chancellor's decree.

VI

Replying Seriatim to the Points Relied Upon for the Issuance of the Writ, Said Points, With Our Responses Thereto, Are as Follows:

A

Petitioners' Point A, Br. p. 29 and 40:

> "It is duty of state court to enforce rights under the Federal Constitution."

Whereto, respondents answer:

Unqualifiedly and unconditionally, but equally reciprocal is the obligation of this Court to respect decisions as to State law. Authorities *supra*. Under this heading, Petitioners make what is, with deference, a false claim and we desire to challenge. The statement we challenge is: (Br. p. 41).

> "• • • At the crucial time when the trial court was attempting to force Petitioners to trial under

> armed guards *Petitioners burned their bridges behind them* and staked their main reliance on their claim that they were not being granted due process of law and the equal protection of the laws." (Italics ours).

This is untrue in fact and unsound in law.

(a) Petitioners conceived that it would be more advantageous to their cause if they abandoned the State court and transferred the litigation to the Federal Court. Appendix "F" hereto, Testimony of Ben F. Cameron in Cause No. 270, United States District Court. Having filed these suits, No. 270, et al., in the Federal Court, on December 11th, petitioners, on December 12th, made a motion, hereinabove quoted, whereunder they made absolutely no averments as to threats of any kind or character, presenting as a predicate for this motion that said by petitioners when withdrawing from the court (Appendix 72):

> "It is our contention when our motion was made to dismiss this Court was divested of jurisdiction. This objection is interposed to reaffirm that position, make clear to Your Honor what the purpose is."

B

Petitioners contend (Br. p. 42):

> "This Court has Final Say Where Claim is Based on Denial of Constitutional Rights."

This, respondents admit.

C

Petitioners contend that the action taken by the State Courts was a violation of the Fourteenth Amendment of the Constitution of the United States in ten specific aspects, dealt with herein seriatim:

I

Petitioners contend: (Br. 44):

"In Overruling Petitioners' Motion to Dismiss Without Prejudice."

Whereto our response is:

(a) Petitioners contend that they had the absolute right to dismiss their claim "under the laws of the State of Mississippi," p. 44. This right was promptly controverted in the Chancery Court and petitioners admonished by the decision of the Chancellor that they were not thus entitled under Mississippi law. Petitioners well understood their obligations when they determined to stand on a refusal to proceed, when the Chancellor refused to dismiss without prejudice, saying (p. 50, 58 and 59):

"• • • • It was extremely urgent that Petitioners be given this opportunity to test finally their right to dismiss because of the rule of Mississippi practice providing that a litigant waives his right to dismiss without prejudice if he goes to trial on the merits—see e. g. Mitchell et al. *v.* Film Transit Co., et al., (1943) 194 Miss. 550, 13 So. (2d) 154, • • •."

"Under Mississippi procedure, when Petitioners declined to proceed further at the special term of chancery court the only thing the chancellor could do was to dismiss their bill with prejudice:

" 'In order to carry out his purpose the guardian should have declined to proceed with the trial and thereupon the defendant would have been entitled to dismissal with prejudice, which would have been a final judgment appealable by the guardian.'

"Mitchell *v.* Film Transit Co., 194 Miss. 550, 13 So. (2d) 154.

"That is the latest pronouncement of the Supreme Court of Mississippi, and is in a case involving procedural questions exactly like this one—even to the

point of involving a cross-bill by the Transit Company." • • •

"Petitioners, faced with the extreme situation outlined above and called upon to decide their course of action, had the perfect right to accept the rule above quoted from a case hardly four years old."

This is reiterated on page 41.

Note the Chancellor on the final hearing decreed (Appendix, 77):

"That the complainants are not entitled to the relief prayed for nor to any relief and that the original bill and all amendments thereto be and they are hereby dismissed with prejudice."

Therefrom, under the *Mitchell* Case petitioners forthwith, having stood upon the motion to dismiss without introducing any evidence whatsoever, except substantially their complaints in the Federal Court, appreciated that they were possibly in contempt, constructively at least, of the Chancery Court and that therefore under settled Mississippi practice their bill would be dismissed with prejudice so that in fact petitioners received from the Chancery Court precisely that which they knew they would get when they thus acted. Compare *Hammond Packing Co.* v. *State of Arkansas,* 212 U. S. 322, 53 L. Ed. 530; Annotation, 144 A. L. R. 372; *Illinois Central R. Co.* v. *Sanford,* 75 Miss. 862, 23 So. 355, 942. Note how Mississippi's court dealt with a somewhat similar situation in *Equitable Life Assurance Society* v. *Clark,* 80 Miss. 471, 31 So. 964. So, as a question of local law, petitioners were precluded from complaining when they thus elected to stand. Compare *American Railway Express Company* v. *Commonwealth of Kentucky,* 273 U. S. 267, 71 L. Ed. 639. A precisely similar principle has been approved by this Court where special appearances are

prohibited as is the case in Mississippi and the State may constitutionally require that a party so circumstanced elect and his election, if erroneous, does not contravene the constitution. *York* v. *Texas,* 137 U. S. 15, 34 L. Ed. 604, 605:

> "* * * The State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants. Antoni *v.* Greenhow, 107 U. S. 769 (27:468). It certainly is more convenient that a defendant be permitted to object to the service, and raise the question of jurisdiction, in the first instance, in the court in which suit is pending. But mere convenience is not substance of right. * * * Can it be held, therefore, that legislation simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his property and his rights against any attempt to enforce a judgment rendered without due service of process and therefore void, deprives him of liberty or property, within the prohibition of the Fourteenth Amendment? We think not."

Approved by this Court several times, recently in *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126, 85 L. Ed. 624. Compare *Kauffman* v. *Wooters,* 138 U. S. 285, 34 L. Ed. 962; Section 1881, Mississippi Code of 1942, and annotations thereunder.

Thus petitioners voluntarily elected to forego submission of the facts to an impartial tribunal for decision on the merits so that they might before the Supreme Court of Mississippi, preserve their right to claim dismissal without prejudice. *"Volenti non fit injuria,"* Broom's Legal Maxims, 268. Constitutional rights may equally be fore-

gone. Compare *Pierce Oil Corp.* v. *Phoenix Refining Co.*, 259 U. S. 125, 66 L. Ed. 855, 858, where it is said:

> "There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right. Pierce *v.* Somerset R. Co., 171 U. S. 641, 650, 43 L. Ed. 316, 320, 19 Sup. Ct. Rep. 64; Wall *v.* Parrot Silver & Copper Co., 244 U. S. 407, 411, 61 L. Ed. 1229, 1230, 37 Sup. Ct. Rep. 609."
>
> S. p. *Yakus* v. *United States*, 321 U. S. 414, 88 L. Ed. 834.

Therefore, petitioners came to Mississippi Supreme Court voluntarily having foregone the right to be heard on the merits so that they might insist upon this technical right.

Specifically, petitioners refer to the State law as admeasuring their rights to dismiss and so it did. The Chancellor held the right nonexistent and on appeal to the Supreme Court of Mississippi, as to Mississippi's law, his decree was affirmed. The Supreme Court dealt only with one State question, namely: The effect of the cross-bills interposed under Mississippi's practice. Note that said by Mr. Justice Smith, Appendix 84:

> "Had there been no cross-bills, it may have been that the complainants would have had the right to dismiss, as they sought to do, but leaving that question aside for the moment, we are of the opinion that they had no right to do so *and at the same time secure the dismissals of the cross-bills, unless by the consent, express or implied, of the cross-complainants.*" (Italics ours.)

In the conclusion of this opinion, Mr. Justice Smith said, Appendix 87:

"We are of the opinion, therefore, that the court was correct in not dismissing the cross-bills, and in proceeding to a final hearing on them, without the attendance of cross-defendants, who purposely absented themselves; * * *.

* * * "In view of the foregoing announcement of our conclusion here, which completely determines the ultimate solution of the problem on the appeal before us, *we do not deem it necessary to discuss other points, on both sides, ably argued in the several briefs filed.*" (Italics ours.)

Petitioners claim the Chancellor should not have dismissed the bill with prejudice, but thereasto respondents insist the action proper because—

A cross-bill had been interposed by the Gulf Refining Company and also by the Ridgway group. We direct particular attention to that said in the cause by Mr. Justice Smith, it being noted that petitioners were not content to dismiss merely their bill but demanded the entire suit should have been cleared from the Chancery Court. That at issue is, with petitioners unwilling to accede to a mere dismissal of their original bill without taking the cross-bills, petitioners were unwilling to have the order entered. The matter of the cross-bills will be dealt with later, but Mississippi's Court has uniformly held under its State practice that these cross-bills must remain at the pleasure of the cross-complainants whereasto we advert first to Mississippi statutes and second to Mississippi decisions.

Mississippi Statutes. 1. That statute whereunder petitioners sought dismissal is Mississippi Code of 1942, Section 1539:

"The plaintiff may suffer a nonsuit, or dismiss a cause, before the clerk in vacation, on paying all costs that have accrued; and the clerk shall enter on the declaration the disposition made of the same, with the date. Where the plaintiff has received satisfaction

> of the cause of action in vacation, he shall, by himself or his attorney, enter such satisfaction on the declaration, and sign the same; and where the plaintiff suffers a nonsuit; or dismisses his suit, without having received satisfaction, he shall stand in the same situation as though he had never instituted suit; but, if the defendant have pleaded or filed a set-off, he may elect to proceed on such counterclaim as a plaintiff, with all the rights of a plaintiff, as against the party who has suffered a non-suit or dismissed his cause, whether in term-time or vacation, and may have a new trial, and judgment if he maintain his demand."

2. Thereunder petitioners have not as yet paid the costs as was a condition precedent to such action. Note the statute "on paying all costs that have accrued". Petitioners assumed to make an alleged tender instead of conforming to that made mandatory by the Legislature. *Guion* v. *Doherty,* 43 Miss. 538; 13 West Publishing Co. Digest, Title "Tender", Key No. 24.

3. Note the concluding paragraph of this Section:

> " * * * but, if the defendant have pleaded or filed a set-off, he may elect to proceed on such counterclaim as a plaintiff, with all the rights of a plaintiff, as against the party who has suffered a non-suit or dismissed his cause, whether in term-time or vacation, and may have a new trial, and judgment if he maintain his demand."

Beginning with the Code of 1857, this has consistently been Mississippi policy. Section 595 of the Code of 1930, Section 803, Code of 1906, Section 741, Code of 1892, are identical, giving by statute "in term-time or vacation" the right to the respondents thus to proceed. It might be contended that the phrase "set-off" did not embrace a suit to confirm or to recover amounts paid out by respondents, but it will be noted that the terminology of this section is

as to the Circuit Court, but that it is equally applicable to the Chancery Court and that, therefore, "declaration" must be read "bill" and the set-off claiming affirmative rights the equivalent of a cross-bill.

In the Code of 1880, Section 1722, the verbiage is somewhat variant.

Note Section 642, Code of 1871, wherein the provision hereasto is:

> "Sec. 642. * * *; and where the plaintiff suffers a non-suit or dismisses his suit, without having received satisfaction, he shall stand in the same situation as though he had never instituted such suit; *provided,* that this section shall not extend to cases in which the defendant has filed or pleaded any set-off or payment, unless by consent of such defendant."

The Code of 1857, Chapter 61, Art. 160, provides:

> "Art. 160. * * * and where the plaintiff suffers a non-suit, or dismisses his suit, without having received satisfaction, he shall stand in the same situation as though he had never instituted such suit: *Provided,* that this article shall not extend to cases in which the defendant has filed and pleaded any set off, or payment, unless by consent of such defendant."

This local statute, containing this verbiage, was for judicial admeasurement as to its contents a local question. Petitioners definitely knew of this law and so knowing elected to act as they did rather than to have their cause determined on its merits.

Frankly, Mississippi's court has not stressed this statute, but its existence and interpretation are most pertinent and this Court will not grant certiorari as to a Federal question with such a local statute on the threshold. Compare *Edward Hines Yellow Pine Trustees* v. *Martin,* 268 U. S. 458, 69 L. Ed. 1050.

Mississippi Decisions. 1. The fundamental policy of Mississippi as mirrored in its Bible as to chancery proceedings (Griffith's Chancery Practice) contains this declaration, (Appendix 85):

> "* * * And not only will the court retain the cross-bill in every case where if the matter had been brought in an original bill it would have retained it, but it should be kept in mind that the advancement of our procedure has developed a definite disfavor towards any practice which tends to turn parties out of court when once they were fairly in, and of sending them away either to transform the pleadings or else to begin the matter over again. * * *".

And as at the date of the rendition of this decree, all persons were before the court, with Gulf Refining Company and Tidewater, under their respective leases, vested with a defeasible title to the oil in place, with the right to work it to exhaustion.

Compare *Koenig* v. *Calcote,* 199 Miss. 435, 25 So. 2d 765, where it is said:

> "* * * the trial court's conclusions also fail to take into account that when the Calcotes executed the oil and gas lease in favor of the Sun Oil Company they had left to the, first, a reversionary interest in the oil, gas and other minerals, if and when the oil and gas lease should 'for any reason' become canceled or forfeited, second, the right to receive the rentals and royalties during the life of the lease, and, third, the fee-simple title to the soil. Armstrong *v.* Bell, Miss., 24 So. 2d 10, and 3 Summers Oil and Gas, Perm. Ed., p. 486, Sec. 601, wherein Mr. Summers states that 'it necessarily follows that after a fee owner of land has leased it for oil and gas purposes he has three distinguishable legal interests in the land and minerals. He has ownership of the land subject to the lease, the right to receive the rents and royalties under the

lease, and a reversionary fee interest in the minerals in place'."

Compare *Merrill Engineering Co.* v. *Capital National Bank,* 192 Miss. 378, 5 So. 2d 666.

Therefore, the oil companies owned 7/8ths of the value of the oil—whereasto this litigation is substantially—and the royalty owners, under whom they entered, held 1/8th royalty and thus the suit to confirm sought establishment of title, *quo ad* the oil in Gulf and Tidewater, as against the Hudsons, and should they therein fail, then as to the Gulf recovery of the costs of sinking its discovery well, with the obligation upon the Gulf and Tidewater, having entered under the original lessors, to bear full fealty to that title, with estoppel, so long as possession was held to attack. Compare *Johnson* v. *Langston,* 179 Miss. 622, 176 So. 531; *Simpson* v. *Ricketts,* 185 Miss. 280 186 So. 318; *Johnson* v. *Carter,* 193 Miss. 781, 11 So. 2d 196; 32 Am. Jur., p. 118; 35 C. J., p. 1239.

Being thus circumstanced and obligated with all persons before the court, the decree on the cross-bill was thus rendered and in so doing, as pointed out by Mr. Justice Smith, conformity was had to Mississippi practice.

In respondents'—Gulf Refining Company's—brief in the Supreme Court of Mississippi this contention in one aspect was stated after quoting Griffith's Chancery Practice, adopted by Mr. Justice Smith. This brief further stated (p. 20):

"Thereunder, Mr. Justice Griffith cites:

"(a) Ladner *v.* Ogden, 31 Miss. 332, 339, 344:

"'* * * The Court may, however, annex such conditions to the order for a dismission as the circumstances of the case require. * * *

" 'When a cross-bill is filed for relief, separate and independent of the original bill, but touching the same property, or growing out of the same subject matter involved in the original bill, and involving the rights of the co-defendants to the original bill, the dismissal of the original bill would not necessarily dismiss the cross-bill; * * *'.

"(b) Compare Gilmer *v.* Felhour, 45 Miss. 627.

"(c) In Dewees *v.* Dewees, 55 Miss. 315, 318, 319, the court said:

" 'We think it was proper also to retain the cross-bill for final hearing. The general equity rule is that the dismissal of the original bill carries with it the cross-bill; but, as said in Ladner *v.* Ogden, 31 Miss. 332, this result will not necessarily follow where the cross-bill is filed for relief separate and independent of the original bill, though touching the same property or growing out of the same subject-matter involved in the original bill. * * *

" 'It was a matter eminently within his discretion, to be wisely exercised, so as to accomplish justice between the parties.'

"(d) Sigman *v.* Lundy, 66 Miss. 522, 525, 6 So. 245:

" 'The cross-bill was properly retained after the dismissal of the original bill. Belcher *v.* Wilkerson, 54 Miss. 677; Dewees *v.* Dewees, 55 Miss. 315. In the latter case it is distinctly announced as the true rule that the dismissal of the original bill will not necessarily carry with it the cross-bill, where the cross-bill is filed for relief separate and independent of the original bill, though touching the same property or growing out of the same subject-matter involved in the original bill.'

"(e) Compare Peoples Bank *v.* Pennington, 137 Miss. 653, 102 So. 386, 103 So. 144.

"(f) Federal Credit Co. *v.* Newman, 16 So. 2d 619:

" '* * * The cross-bill was lawfully filed under the order of the court in full force at the time, and now

to dismiss it along with the original bill, although ostensibly without prejudice, would be to let in the defense of the statute of limitations as to several cross-defendants, working thereby a palpable injustice to the cross-complainant. See the discussion of the subject and the citations of the cases in Griffith's Mississippi Chancery Practice, Section 384. It was error to dismiss the cross-bill or in any way to interfere with any procedure or order taken by virtue of it.' "

Compare *Jackson* v. *Lemler,* 83 Miss. 37, 35 So. 306.

So, that with deference, this case but applied that which had been precedently the law in Mississippi, but at all events was a question of local, not Federal, right.

But, in addition to this interposition of the cross-bills, there were the following additional factors which precluded, under State practice, or could have under State practice, this dismissal without prejudice:

Upon December 15, 1944, the petitioners executed a protective lease unto the Gulf wherein was contained this provision:

"And, further, notwithstanding any provisions of this lease, apparently to the contrary, it is agreed and understood that Lessor shall not be entitled to and Lessee shall be under no obligation to pay Lessor any of the royalties, or any part thereof, provided for herein unless and until in the suit entitled N. L. Hudson, et al., complainants, *vs.* The Gulf Refining Company, et al., defendants, No. 398, Chancery Court for the First Judicial District, Jasper County, Mississippi, lessor shall have established by a compromise settlement between the parties thereto, or by final decree of the court therein, that the Lessor herein is the owner of the lands and minerals hereby leased and involved in said suit or the owner of an interest therein."

After the execution of this instrument, it might possibly well be, under the State practice, that complainants did not possess this right. Compare *Blakey* v. *Blakey*, 3 J. J. Marshall 674 (Ky. 1830); 17 Am. Jur., Sec. 7, p. 61; *Jarvis Ex'r* v. *Interstate Coal Co.*, 257 Ky. 656, 78 S. W. 2d 926; *Trust Co.* v. *Fitzpatrick*, 71 Miss. 347, 14 So. 270; *Russell* v. *Denson*, 98 Miss. 859, 54 So. 439; *Adams* v. *Lucedale Commercial Co.*, 113 Miss. 608, 74 So. 435.

In view of the peculiar character of this cause, predicated as it is upon a lost deed, alleged to have created a life estate with remainder over, it is submitted that petitioners were and are not entitled to a non suit, because through discovery had, interrogatories answered and records examined, there has been made available and competent such evidence as to preclude effectively and effectually the assertion by petitioners of any right to this land. So when petitioners thus circumstanced sought to dismiss, it was a question for Mississippi's court to determine. Such a benefit had accrued to respondents as that respondents' consent to a dismissal was prerequisite. The Chancery Court thus thought thereasto. The Supreme Court did not actually pass but reserved its opinion. With deference, Mississippi might at pleasure require parties instituting suits to have the same continued until Mississippi determined that the right accruing to defendants would not be affected and, with deference, might even go one step further and require that when full answer had been made, consent of respondent would be requisite. This is a matter of State practice whereover the State of Mississippi is sovereign and whereasto there was lacking Federal authority.

But petitioners concede that under the settled rule in Mississippi, it was obligatory upon petitioners to submit to

a judgment on the merits when the Chancellor declined to dismiss without prejudice, if the petitioners desired to test as a State question the sufficiency of their right so thus to act, and when thus knowing that their right to relief would be determined by the decision of the State Supreme Court after full hearing, the petitioners may not raise a Federal question as to the way in which Mississippi Supreme Court decided the interpretation of Mississippi statutes, it being obligatory upon this Court at all times as to Mississippi procedural statutes to conform. Not even an unexpected change in judicial opinion, had the ruling been precedently contra, was sufficient to give petitioners a right to review, for as to State questions in matters of State policy, the State Court was supreme.

Compare *Central Land Co.* v. *Laidley*, 159 U. S. 103, 40 L. Ed. 91, 95:

> "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States. Walker *v.* Sauvinet, 92 U. S. 90 (23:687); Head *v.* Amoskeag Mfg. Co., 113 U. S. 9, 26 (28:889, 895); Morley *v.* Lake Shore & M. S. R. Co., 146 U. S. 162, 171 (36:925, 930); Bergemann *v.* Backer, 157 U. S. 655 (39:845)."

Compare *A. M. Klemm & Son* v. *City of Winter Haven*, 309 U. S. 638, 84 L. Ed. 433, 993; *Neblett* v. *Carpenter*, 305 U. S. 302, 83 L. Ed. 182, 187, where it is said:

> "All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment." (Collecting cases.)

Compare *Muhlker* v. *N. Y. & H. R. Co.*, 197 U. S. 544, 49 L. Ed. 872. We adopt as unquestioned law that said by Mr. Justice Holmes, and as reannounced in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1493:

> "The fallacy underlying the rule declared in Swift *v.* Tyson is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute', that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts 'parties are entitled to an independent judgment on matters of general law:' 'but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. . . .
> 'the authority and only authority is the state, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word'. Thus the doctrine of Swift *v.* Tyson is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' "

It was never controverted that as to lands and local statutes, the law of Mississippi was what its Supreme Court said it was in virtue of its court so saying after full hearing. Therefore, when that court construed its statutes and its common law as to the efficacy of this cross-bill under those laws that court then spoke with authority.

Much is later said by petitioners as to the right to

retain the cross-bills and thereon to proceed, but Mississippi's policy is amply declared by Mr. Justice Griffith in his work, hereinabove quoted, and when under the *Film Transit* case, admitted to be specifically applicable, there had been no dismissal as to any person and all persons were present in the court on May 6th, except the petitioners who had voluntarily withdrawn, it was then a question for Mississippi court whether the cross-bills, undismissed, with the original bill undismissed, for that court to determine what it would do and when it dismissed on the merits as petitioners admitted that they knew it might do, then when all of these respondents, more than 100 in number, were before the court that adjudication was, with deference, proper, because it would have been the heighth of absurdity to have compelled the Gulf and Tidewater to bring in by process those who were present in court by additional pleadings and await probably a six months' period or more before those who were then present and willing to be heard should be heard, visualizing, as we have hereinbefore shown, the extent of the rights that were in these parties vested.

But, with deference, petitioners have placed themselves in an indefensible position. They admit, under the *Film Transit* case, it was inevitable that dismissal on the merits should be had—Mississippi practice so required—but, say petitioners, the course of conduct by the Chancery Court and the Supreme Court violated their constitutional rights in virtue of the hearing had on May 6th.

(a) If the only thing that the Chancery Court could have done was the rendition of a decree of dismissal without prejudice the Chancery Court thus so did, as hereinabove quoted, and thereby it was determined as between petitioners and all parties that petitioners had no right, title or interest in this property and were not entitled to re-

cover. Advert to quotation from petitioners' brief herein made.

So that, after the adjudication under section two of the final decree, dismissing petitioners bill, as was admitted appropriate, then that thereafter done was, even if void, which we deny, ineffective and the fundamental maxim is: "*Utile per inutile non vitiatur,*" Broom's Legal Maxims, and therethrough under petitioners' concession, effective title was lost to the same extent and in the same manner, so they claim, as if confirmation had been had so that when the decree was had dismissing the bill, rectification was wrought. Now, with petitioners thus admitting under the *Film Transit* case that this judgment was inevitable, that which they now seek is to make this Court reverse so as that there may be a dismissal without prejudice in virtue of that which subsequently occurred when, according to petitioners' concession, cancellation with prejudice under a dismissal was inevitable. Frankly, when petitioners thus conceded the dismissal with prejudice, appropriate for their proper presentation by final decree, there is naught else in this case whereas to this court with its multi-form duties need be burdened. In short, petitioners had to happen to them precisely that which they knew would happen and having happened they may not reverse their election and claim that whereto they were fully advised, the law gave them no right.

(b) But one step further, it is true that when petitioners declined to participate in the hearing the court was not obligated to deal with them in the usual manner, for, frankly, walking out on a court is a course of conduct that brings the judicial system into contempt and if counsel at this bar should advise this Court that under its decisions, it was obligatory upon this Court to reverse a decision made, let us say, in the Circuit Court of Appeals, and that

this Court should thereupon disagree with counsel as to the necessity for a hearing and counsel should thereupon advise this Court that he would withdraw and stand upon his right to appeal to high heaven, that would not deter this Court from making an appropriate determination under the Constitution, as here understood. But after this Court had so thus in good faith done, counsel who had thus walked out, would not be in a position where he could be further heard. Compare *Hammond Packing Co.* v. *State of Arkansas,* 212 U. S. 322, 53 L. Ed. 530; Annotation, 144 A. L. R. 372; *Illinois Central R. Co.* v. *Sanford,* 75 Miss. 862, 23 So. 355, 942.

In short, Mississippi, as well as many other States, has passed statutes under which, when parties withdraw in virtue of such withdrawal, judgments may be rendered as by default, but therein Mississippi deals exceedingly tenderly with matters of this character. Compare *Equitable Life Assurance Society* v. *Clark,* 80 Miss. 471, 31 So. 964. But as pointed out by Mr. Justice Griffith, citing *Baird* v. *Bardwell,* 60 Miss. 164, 169, Mr. Justice Cooper said:

> "* * * The absence of the complainants in no degree affected the right of the defendants to submit the case for final hearing—they had the right to do this, * * *".

Approved by Griffith's Chancery Practice, Sections 538 and 562. So that, when petitioners walked out on the court, strictly as a matter of law, this Court might have, as petitioners admit, dismissed with prejudice, but the Chancellor was minded to find out what were the real facts and when petitioners had refused to disclose what facts they had in mind and under their control, these respondents introduced a public record of Jasper County showing a warranty deed in fee simple from N. L. Hudson to his wife, Mary E. Hudson, for this entire property in 1880 and

established by three practicing attorneys (the public records having been destroyed September 10, 1932), that they were familiar with this title and that it was in fee simple. In addition, respondents showed absolute possession under conveyances of the entire title. Compare *Peeples* v. *Boykin,* 132 Miss. 359, 96 So. 177, where the effect of recorded conveyances is judicially established. Thus respondents showed

(a) That there was no life estate;

(b) That there was a conveyance in fee;

(c) Absolute possession taken under claim and color of right, continuing for possibly 60 years. Now, even if we admit, which we do not, that it was improper for the Court thus to admit this evidence, still thereby the Court rendered only that decree which it would have rendered had this evidence not been introduced and, therefore, when the evidence was introduced and made the court's mind doubly sure, petitioners were in no way prejudiced when the Court's decree, rendered after the hearing, was precisely the same it would have been had the Court done that which counsel admit under the *Transit* case was absolutely requisite and necessary.

In Mississippi, in order for a person to assign error, it is quite essential that the error assigned should be of a matter which was detrimental to the party assigning and if on the record the right result has been reached upon the record before the court, the court will affirm it even though there might be certain erroneous rulings therein apparent. So, herein, petitioners concede the necessity of the rendition of the court of this judgment of dismissal with the right of the Supreme Court of Mississippi to pass thereon, but contend that this Court will grant certiorari to reverse in virtue of alleged erroneous proceedings had subse-

quently, which, *per se* according to counsel's admission, in no way changed the extent whereto petitioners lost their rights. In short, petitioners toyed with the Chancery Court, taking the view that they knew more accurately that which the Supreme Court would hold under these peculiar facts than did the Chancellor and so knowing they voluntarily ignored the admonition given by the Chancellor that they might not dismiss without prejudice and so withdraw as to render it quite essential that the Chancellor should, to preserve the dignity of his court render a dismissal. That is what petitioners sought; that is what petitioners got, and knew they were going to get, and having gotten it, the Supreme Court held the learned Chancellor correct and that, as is perfectly obvious from this petition, the petitioners were in inexplicable error as to each thing by them done and in each thing by them contended for. In short, petitioners notwithstanding the decision of the learned Chancellor that they might not dismiss without prejudice defied the Chancellor to do his worst. So that therefrom when he so did, the petitioners might appeal to the Supreme Court as from a final judgment and the final judgment having been rendered solely because petitioners would not do that which the law gave them time and place to do, we assert that having gambled and lost they may not impose upon this Court the duty to hear again when petitioners behaved as they did. In short, with deference, petitioners must have had a powerfully weak case to be unwilling to submit on its merits to a Chancellor who had been as conservative as Chancellor Neville and not to gamble upon a reversal of a final judgment which petitioners made requisite by their conduct. This Court does not sit to rectify where those who invoke its jurisdiction have been thus neglectful and averse to law conformity.

Further, petitioners say (Brief, 47):

> "Any consideration of whether the Petitioners were denied due process of law, therefore, must proceed on the assumption that the trial court committed error in refusing to permit Petitioners to dismiss their State Court case."

This, we, with deference, challenge.

And counsel say, p. 48:

> "From that point on the chancellor was running in competition with the Federal actions and that fact was kept constantly before him by Petitioners and the constitutional rights claimed by Petitioners must be judged in the light of the fact that the actions of the State Courts were taken with full knowledge that those actions would, and did, impinge upon the jurisdiction of the Federal Court."

The declaration that the Chancellor was proceeding with undue haste is untrue in fact for there is absolutely no evidence whatsoever thereasto in this record. If it be (whereof later) that the District Court did have jurisdiction, still the Chancery Court in virtue of its jurisdiction had a right to proceed as it did, duly and properly, and to render its decree in due course. Compare *Moore* v. *Pate*, 39 Fed. 2d 616, Certiorari denied, 282 U. S. 853, 75 L. Ed. 755. This Court reiterated the well-established rule in *Kline* v. *Burke Construction Company*, 260 U. S. 226, 67 L. Ed. 226, 230:

> "Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res judicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. * * *".

Commonwealth Trust Co. v. *Bradford,* 297 U. S. 613, 80 L. Ed. 920; *Toucey* v. *New York Life Ins. Co.,* 314 U. S. 118, 86 L. Ed. 100.

It is perfectly obvious that petitioners in virtue of these Federal court suits, No. 270, et al., could not enjoin the proceedings in the State Court under Judicial Code Section 265.

Therefore, we, with deference, submit petitioners for these reasons had no right to dismiss and the decision of the State Court thereasto was appropriate, but if inappropriate, involved the violation of no Federal rights. Rectification may not be here wrought.

II

Petitioners next complain (Brief, 49):

> "In Denying Interlocutory Appeal to Settle Petitioners' Right to Dismiss and Calling a Special Term and Forcing Petitioners to Go to Trial in the Face of Threats and Armed Guards When Petitioners Were Insisting on Their Constitutional Rights and Their Right to Pursue Federal Actions Free From Threats and Intimidation."

Our response thereasto is divided into two parts:

(a) The State may admeasure the right to appeal at pleasure. Such action constitutes no Federal violation. In Mississippi, appeals were by law allowed from assessment to all persons other than railroads. To them no appeals were granted. Invocation of the Fourteenth Amendment was made but denied by Mississippi's Court. Compare *Y. & M. V. R. R. Co.* v. *Adams,* 77 Miss. 765, 779. Appeals are purely statutory. Compare *Keeton* v. *State,* 197 Miss. 11, 19 So. 2d 477; 4 C. J. S., 61; 2 Am. Jur., 847.

As to interlocutory appeals, Mississippi narrowed its statute so as that it presently reads: (Section 1148, Mississippi Code, 1942):

> "An appeal may in sound discretion be granted by the chancellor in term time, or in vacation, from any interlocutory order or decree * * * or when having sustained or overruled a demurrer or motion he may think an appeal proper in order to settle all the controlling principles involved in the cause, or in exceptional cases to avoid expense and delay; * * *".

Obviously that sought by Petitioners was not thereunder authorized and yet they seek to commandeer Mississippi's judicial remedies to serve their ends, notwithstanding the public policy of Mississippi to the contrary.

Compare *Lott* v. *Windham,* 191 Miss. 849, 4 So. 2d 342, where it is said:

> "The demurrer raised and the interlocutory decree thereon adjudicated merely a procedural matter (Section 396, Code 1930) and an appeal therefrom not only would not settle all controlling substantive principles involved in the cause, as contemplated by Section 14, Code 1930, but, indeed, none at all. The appeal therefore must be dismissed."

Citing many cases, especially, *Liberty Trust Co.* v. *Planters Bank,* 155 Miss. 721, 124 So. 341. Compare *Universal Life Ins. Co.* v. *Keller,* 197 Miss. 1, 17 So. 2d 797.

Compare *United States Alkali Export Association* v. *United States,* 325 U. S. 196, 89 L. Ed. 1554, 1560:

> "It is evident that hardship is imposed on parties who are compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment. But such hardship does not necessarily justify resort to certiorari or other of the extraordinary writs as a means of review. In such

cases appellate courts are reluctant to interfere with decisions of lower courts, even on jurisdictional questions, which they are competent to decide and which are reviewable in the regular course of appeal. (Authorities). The writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews. Roche *v.* Evaporated Milk Asso. supra (319 U. S. 30, 87 L. Ed. 1192, 63 S. Ct. 938), and cases cited; and see Cobbledick *v.* United States, 309 U. S. 323, 84 L. Ed. 783, 60 S. Ct. 540."

That thus vehemently contended for by petitioners is so obviously improper as to be cause of comment. Petitioners well knew no such appeals were permissible and yet petitioners would have this Court reverse the Supreme Court of Mississippi for conforming to the express terms of an explicit statute.

(b) Petitioners contend impairment of constitutional rights by:

> "* * * Forcing Petitioners to Go to Trial in the Face of Threats and Armed Guards When Petitioners Were Insisting on Their Constitutional Rights and Their Right to Pursue Federal Actions Free From Threats and Intimidation."

The matter of threats has been hereinabove disposed of, but there remains the alleged insistence of petitioners' rights in the District Court. Apparently petitioners would have this Court to assume that the District Court in these four suits had unquestioned jurisdiction whereasto there might be no objection raised but note

1. As to twenty acres of the land in controversy the citizenship, under petitioners' theory, was not diverse and, therefore, as to these twenty acres, the suit, No. 398, Chancery Court, and those parties interested in these 20 acres have no recourse to an adjudication settling their title and vouchsafing them royalty accruing over many years, other than through an adjudication in a State court. Therefore, the Federal Court was not able to administer complete justice in one suit.

2. But as to the remaining acreage petitioners advise this Court that they had "beaten back" all attempts at dismissal, but they did not advise this Court that presently this jurisdiction is again in issue under these facts.

Respondents called attention to *Veal* v. *Thompson*, 138 Tex. 341, 159 S. W. 2d 472, wherein the effect of unitization upon mineral ownership is adjudged. Mississippi has almost uniformly followed the Texas decisions. Compare *Stokely* v. *State*, 149 Miss. 435, 115 So. 563; *Merrill Engineering Co.* v. *Capital National Bank*, 192 Miss. 378, 5 So. 2d 666; *Koenig* v. *Calcote*, 199 Miss. 435, 25 So. 2d 763.

After the overruling of respondents' motion to dismiss the District Court cases by Judge Mize in March, 1946, the Circuit Court of Appeals of the Fifth Circuit decided *Keegan* v. *Humble Oil & Refining Co.*, 155 Fed. 2d 971, on June 13, 1946, rehearing denied July 23, 1946, and specifically approved the Texas rule as to indispensible parties under unitization agreements.

The Circuit Court of Appeals also reversed Judge Mize in *Calcote* v. *Texas Pacific Coal & Oil Co.*, decided July 31, 1946, 157 Fed. 2d 216, Certiorari denied November 18, 1946, 328 U. S. (No. 1) 29, 91 L. Ed. 80; Rehearing denied December 9, 1946, 328 U. S. (No. 1) 30, 91 L. Ed. 242, showing the absolute want of jurisdiction in the Federal Court in a diversity suit involving, if you please, a reformation of a

contract whereunder all parties participating in the ownership were uniformly bound without making those parties who were citizens of Louisiana and Texas parties thereto in any way.

This matter is set for re-argument before Judge Mize, on September 29, 1947. That which Judge Mize, before these decisions, assumed to do was merely to hold that he might frame his decree so as not to affect those persons holding those mineral interest who were consciously omitted by petitioners.

3. Herein Cause No. 398 in the Chancery Court was pending and thereasto those things shown in the record had been done, and with that cause thus pending petitioners assumed to file these four suits in the district court, and having thus done assumed to argue that the jurisdiction in the district court had become exclusive of the power in the chancery court to proceed. In petitioners' contention there are manifold errors.

a. That sought was not so in rem as to make the jurisdiction of either the State court or the Federal court exclusive one of the other, but that these two suits could so operate, one in one court, the other in the other court, as that both in due course could be brought to final judgment, the one wherein the final judgment was first rendered controlling as to what should be the judgment in the other. Compare *Kline* v. *Burke Construction Company,* 226 U. S. 226, 67 L. Ed. 221; *Lyon Company* v. *Karatz,* 262 U. S. 77, 67 L. Ed. 871; *Moore* v. *Pate,* 39 Fed. 2d 616, certiorari denied 282 U. S. 853; 75 L. Ed. 753.

b. The jurisdiction of the Federal court in a matter of this character is not in any way exclusive and in no way deprived respondents of those rights in Cause No. 398

vouchsafed to them by the laws of Mississippi, and petitioners could not by any act done in these Causes Nos. 270, et al., divest or impair the right of these respondents thus to litigate in Cause No. 398, conforming therein to that which was lawful under Mississippi's jurisprudence, for to this land thus situated in Mississippi, Mississippi had a peculiar sovereignty, and one in this aspect, with deference, quite exclusive of the jurisdiction of the United States, the district court being substantially nothing but another State court. *Angel* v. *Bullington, supra.*

4. As to petitioners allegation as to the improper calling of the May term of the chancery court, petitioners did not—as they could not—introduce a single scintilla of evidence that the chancellor did otherwise than he should in convoking a special term for the disposition of litigated cases when he was free from judicial burdens in other counties. In short, petitioners here charge that Chancellor Neville called this May term in such a wise as that he thereby impaired the constitutional right of petitioners under the 14th Amendment by the date at which this term was called. In short, the contention is that an upright judge—presumed so to be conclusively until contrary is shown—so assumed to prostitute his functions as that he improperly assembled his court to do an illegal deed, and in its ultimate analysis on this aspect, there is that whereto certiorari is herein demanded, without a scintilla of proof that the Judge so did, or would have so done, the petitioners lugging in the letter under confidential cover to all counsel, stating what he thought to be his problem, asking their suggestions thereasto and assuring all that they would be protected in his court. Of such a judge it is pretended that he called this May term to deprive the petitioners of that which to them was granted by the Constitution of the United States, superceding thereasto all State authority.

The implication of the granting of such a writ would *per se* be so serious as we submit to require its refusal. Authorities *supra*.

Note that said on pages 53 and 54 of petitioners' brief:

> "It is clear that if the chancellor had permitted the state court litigation to go on to the regular time of trial on the second Monday of July, the federal court would have completed the trial of the actions on their merits. What the state court did, therefore, *was done deliberately* and with full knowledge of the effect such action would have on the petitioners in their effort to *obtain a trial in the federal court.* • • •
>
> "This forcing of the State court case to trial out of its regular order under these circumstances and in direct disregard of the federal rights so earnestly presented by petitioners constitutes a direct impingement upon the jurisdiction of the federal court which was proceeding with petitioners' federal actions."

We cannot too often iterate or too strongly condemn the statements made by petitioners as to what might have been but was not, and are prone to recollect as to petitioners' case that not a single allegation is realistic. The best is a mere figment of the imagination invoked to bolster up. For petitioners, the saddest word of tongue or pen, it might have been, but herein was not and never will be. Substantially that asked is certiorari to relieve petitioners of a fraud, claimed in petitioners' brief to have been perpetrated by the Chancellor in calling a special term of court. Fraud must be both pleaded and clearly proven. It is never presumed. *Harris* v. *Godbold,* — Miss. —, 21 So. 2d 149.

5. Petitioners' forebears had dwelt in Jasper County through several generations and in that county at the time of this trial they had their blood kin to whom they were in no sense strangers, and they well knew that their kinsmen would not be disloyal to them. These petitioners are not

strangers to Mississippi. They had their origin therein and were but temporarily removed, and may not as to their mother state, we submit, make such unjustified claims as to condemn her courts.

6. Respondents protest against the utilization of the characterization of this adjudication "a farce". Petitioners knew precisely what they were going to do before the case was called and knew that if the Chancellor acted with that mandatorily required by the decisions of the Supreme Court there would be a dismissal of this bill with prejudice. Petitioners may not mislead this court by this cry of threats when what they were going to do was to them well known and that which they are herein doing is but attempting to color favorably their act in withdrawing. We say this with deference, but Mississippi, as above shown, had the right thus to prescribe, petitioners so knew, so expected, and were not disappointed, except they did badly misjudge what is the law in Mississippi on this score.

7. We have examined every decision cited by petitioners in their brief, and save where the same are specifically referred to herein we have found not in any of them any conflict with that wherefor we herein contend, and to save prolixity have not adverted to them.

8. Advert to counsel's brief, page 55, where it is said:

> "• • • The chancellor was fervently importuned to proceed with the case by the representation of counsel that the state court had exclusive jurisdiction—see e. g. the statement of Mr. Green at page 73 of the Appendix: 'We thought and still think that the exclusive jurisdiction to adjudicate this case is vested in this court.' "

Turn to the Appendix, page 73 where that thus said is shown:

"By Mr. Green:

"On behalf of Gulf Refining Company we have in this (R. 857) original suit interposed a cross bill. We want to be perfectly fair and frank about this. We thought and still think that the exclusive jurisdiction to adjudicate this case is vested in this court. We are ready so far as the Gulf Refining Company is concerned to go on with this case and have it determined."

No other counsel went further and that whereto we made reference was to the decisions by the Circuit Court of Appeals hereinabove adverted to, and wherein as shown, Judge Mize had been reversed wherein petitioners had consciously omitted all residents of Louisiana and Texas who were indispensible parties defendant and in addition, had been wholly unable even on that basis to formulate a bill whereunder they could claim relief as to 20 acres of this land. We repeat without fear of successful contradiction the precise claim which we made before the chancery court, and which was reiterated in the supreme court of Mississippi thus, after citing the court of appeals decision:

"So that when appellant urges that the federal suits should go forward, with deference, he is misstating the applicable conditions, for under these controlling decisions postdating Judge Mize's ruling in this case, that is an impossibility."

III

Petitioners assert:

"In Proceeding to Judgment Against Petitioners on Exparte Hearing at a Time When the Case was not Triable because of the Absence of Necessary Parties."

Answers thereto are:

(a) This was exclusively a state question and so determined by the chancellor and the supreme court. With

deference, we deny that process had not been served on the two minors, Claudies and Paul Ellis Newell, but assuming that they had not been thus served, the answers are:

1. Petitioners could not complain of an error made in favor of Claudies and Paul Ellis Newell under Section 3404, Code of 1930, Section 1988, Code of 1942:

> "• • • and one of several appellants shall not be entitled to a judgment of reversal because of an error in the judgment or decree against another, not affecting his rights in the case."

Compare *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 89 L. ed. 1725. Furthermore, in *Posey* v. *Bank of Philadelphia*, 92 So. 840, 130 Miss. 530, 95 So. 134, 130 Miss. 825, reversing the prior rule, decrees were made several in Mississippi so as that the former rule, void as to one, void as to all, forever disappeared, it having been, with deference, initially ill considered, our contention to the contrary in the *Posey* case notwithstanding.

2. These petitioners against whom the decree was rendered, at their own invitation may not when they obtain that wherefor they expressly bargained, assert that that given these Newells was not to the Newells still due. It would be strange indeed to visualize the Newells petitioning this court for certiorari to reverse a decree in their favor wherethrough they would as soon as it became final have the vouchsafed royalty whereasto they have been actively litigating since 1944. No person other than the Newells were in any wise affected by their status and if, which we deny, petitioners may assert the rights of these parties, which rights could not affect this decree further than they individually were concerned, *quoad* all other persons the decree was perfectly proper and should be affirmed. Under Mississippi practice any defense successfully made by one defendant inures to the benefit of all others, and would require

the dismissal with prejudice in favor of the Newell minors. *Soria* v. *Stowe,* 66 Miss. 615, 6 So. 317; *Kelly* v. *Brooks,* 57 Miss. 225.

We want to stress the anomaly of a petition for certiorari under federal rights predicated upon the determination by a local court that the cause was then triable, and upon such announcement being made the parties so petitioning for certiorari solemnly assuring the court that in order to stand upon their right to dismiss without prejudice they were withdrawing from the courtroom. With deference, this claim is not quite consistent with the duty owed to this court.

IV

Petitioners claim:

> "In Proceeding to a 'Trial on the Merits', Including Decree on Cross-Bill, When Mississippi Practice Permitted Only Dismissal with Prejudice After Petitioners Declined to Proceed Further."

whereto respondents make answer:

(a) As hereinabove set forth, not repeated to save prolixity.

(b) When petitioners concede that on their refusal to hearing the court was obligated to render judgment of dismissal with prejudice and so did, then with deference all else became *quoad* petitioners absolutely moot. Compare that said substantially in this aspect by Mr. Justice Smith, Appendix page 82:

> This brings us back to the original bill—whether it should have been dismissed, retaining the cross-bills. This, as it seems to us, has now become, as to all practical purposes, a moot question. Under the cross-bills every issue and question, which could have been determined under the original bill, were adjudicated

> against the original complainants and cross-defendants in favor of cross-complainants and their privies. Thereby the whole matter has now become res adjudicata. Van Zandt *v.* Town of Braxton, 149 Miss. 461, 465, 115 So. 557; Watkins *v.* State Board, 170 Miss. 26, 32, 154 So. 277. Upon similar principles see also Griffith's Chan. Pract., Secs. 263, 363, 571, 624."

and with the concession that it was obligatory upon the Chancellor to do that which he did do, and having so done, petitioners were without right to obtain in this court under certiorari anything that would subvert that which was appropriate under Section 2 of this decree. We iterate that petitioners got exactly what they bargained for on their demanded appeal to Mississippi's court and therein found that properly Mississippi's supreme court affirmed without passing on at least four independent state questions whereover Mississippi's court had exclusive jurisdiction, and whereasto this court was without power of review. Authorities *supra.*

(c) Under Mississippi's practice if the right result is reached even though erroneous evidence be introduced, or the wrong reason therefor given, Mississippi's court will affirm. Compare *Thomas* v. *State,* 61 Miss. 60, wherein the appellant took the stand, said what happened, and under that which he said he was due to be executed for murder, and the supreme court affirmed, notwithstanding technical error. We do not concede in this cause any errors, but so obviously the right result was reached that even though there might be such, certiorari here would not apply, for Mississippi's supreme court has not up to this date passed upon all of those state questions whereon it could render an affirmance, and with deference to petitioners, there is not assigned a single error which as we see it calls for serious consideration by this court.

(d) Counsel claims:

> "What this court faces is the failure of the trial court and the Mississippi supreme court to accord to petitioners rights given under rules of practice which are admitted to exist. That is entirely another matter."

With deference, we controvert that either the chancery court or the supreme court did not vouchsafe to petitioner everything whereto petitioners were entitled under this record under the state law, but if it be that Mississippi's supreme court was so ignorant as that it could not consistently administer its own law with deference the remedy is not to be certiorari here, but rectification at home. Compare *Tracy* v. *Ginzberg,* 205 U. S. 170, 51 L. Ed. 755, 759, wherein it is said:

> "* * * The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property."

With deference, we resent the statement that Mississippi's court did not admirably administer that system of laws there existing, accurately admeasuring to petitioners precisely what they were entitled to under Mississippi's jurisprudence. They had a full opportunity to argue this case before the supreme court. They so did. They fully briefed it, they reargued in their suggestions of error. They, contrary to the rules of Mississippi's court, then assumed to dictate under a motion to correct the judgment on June 2, 1947, and that, too, was overruled. Petitioners have received every consideration whereto they were entitled and when they chose to have this bill dismissed with prejudice rather than to confide to Mississippi's court the

truth or untruth of their contentions, they may not complain, for their election was made by them and not by Mississippi, and Mississippi may not be, under the 14th Amendment, penalized for that by petitioners voluntarily done.

V

Petitioners claim:

> "In Awarding Judgment Against Petitioners on the Cross-bill of the Ridgways."

whereto respondents answer:

(a) Those hereinbefore made.

(b) The chancery court did not grant affirmative relief on the Ridgway cross-bill. The sole relief granted the Ridgway group by the Chancery Court was under clause 2 of the decree.

(c) We admit, as is perfectly obvious, that the supreme court did advert to the Ridgway cross-bill in considering whether or no petitioners had the absolute right to dismiss this entire suit, and the conclusion of the supreme court thereasto is eminently accurate.

(d) Petitioners say on this petition for certiorari, repeating a rejected contention before Mississippi's supreme court that no service was ever had upon petitioners under this cross-bill. In Mississippi's supreme court it was there solemnly said, and is here reaffirmed by counsel at the bar, that this cross-bill, along with the answer whereof it is a part, was lawfully served upon Judge Lamar F. Easterling at a time before other counsel became connected with this litigation, and Judge Easterling before a Mississippi court, and doubtless here will do the same, affirmed that he would not controvert in any way the declaration of counsel

for respondents that service had been lawfully made. The statute of Mississippi thereasto provides:

> "* * * but five days' notice, in writing, to the solicitor of the complainant in the original bill shall be sufficient to require the complainant to appear to such cross-bill, and to answer the same within said time, unless the court, or chancellor in vacation, for cause shown, extend the time for answering."

This statute does not require formal process or filing, and the supreme court of Mississippi regarded that done as appropriate under Mississippi statutes. However, with this cross-bill unquestionably in the record, petitioners made a motion to dismiss, not the original bill, but the entire suit, including this cross-bill of the Ridgeways, and when they so did that presented to the court was what the court should do with this cross-bill actually filed claiming affirmative relief. Having thus moved to dismiss it as part of the suit, petitioners are not privileged to say that their motion so thus embracing specifically this cross-bill did not bring to the judicial mind that therein embraced. Whether it so did or not was under Mississippi law a question of Mississippi jurisprudence and when a motion is made (there being no special appearances in Mississippi) the party making it becomes subject to the jurisdiction of the court. *Miss. Cottonseed Products Co.* v. *Champion,* — Miss. —, 29 So. 2d 684; *Maloney* v. *Tatum,* 199 So. 129, 134 So. 714; *Express Co.* v. *Diggs,* 165 So. 292, 174 Miss. 650.

So when with the cross-bill in the record and the Ridgeway group claiming relief thereunder, the petitioners sought its dismissal they were bound by its existence and moving for dismissal were obligated to integrate its effectiveness into that whereasto they sought relief. To contend that this cross-bill was "a nullity" (compare *Calcote*

v. *Taxas Pacific Coal & Oil Co.*, 157 F. 2d 216, where precisely similar cross-bill was filed) when they made a specific motion to embrace it, along with the remainder of the suit, puts petitioners in the awkward position of inconsistency, to say no more.

We have examined all of the authorities cited by petitioners, but we have not found one in which when a motion was made by a petitioner to dismiss that full implication was not vouchsafed. In short, in many instances a motion to dismiss on the merits has operated as a waiver. Compare *Big Vein Coal Co.* v. *Read*, 229 U. S. 38, 57 L. Ed. 1056.

As to effectiveness of this cross-bill, it is similar in a large measure to that filed by the Gulf Refining Company, and was adjudged by Mississippi's court under Mississippi's practice to be an operative pleading wherefrom, with deference, petitioners may not escape, for they voluntarily made this motion and having so done complete waiver was wrought. Compare *Calcote* v. *Texas Pacific Coal & Oil Co., supra,* whereon the District Court granted relief on such cross-bill.

VI

Petitioners claim:

> "In Proceeding to Judgment on Gulf's Cross-Bill Without Giving Petitioners the Opportunity to Answer and Defend it After the Demurrer to the Cross-Bill was Overruled and When Petitioners had Settled With Gulf."

whereto our responses are:

(a) As to the alleged settlement with Gulf, with deference, as noted hereinabove, the Gulf Refining Company gave petitioners full notice of that wherein the Gulf Refining Company contended (App. p. 73).

(b) For $50,000.00 cash paid, the petitioners executed to the Gulf Refining Company a protective lease wherein Sec-

tion 14 as quoted *supra*. Furthermore, Tidewater Association Oil Company obtained a similar lease. Both of these companies held under leases precedently obtained and in no way surrendered. As to such former lessors, both of these oil companies felt obligated to do that requisite to vouchsafe these original lessors that which was covenanted to be paid to them. As lessees in possession, these oil companies were probably subject to certain disabilities. Compare *Newman* v. *Mackin*, 13 Smedes & M. 383; *Griffin* v. *Sheffield*, 38 Miss. 359; *McNeeley* v. *City of Natchez*, 12 Fed. (2d) 3, cert. den. 47 S. Ct. 767, 71 L. Ed. 1339. But counsel is wholly in error when he states that the Gulf Refining Company in any way abrogated its obligation to its initial lessors. For them and in deference to them it has fought, and as stated by petitioners, "led the fight in the district court" (R. p. —) which very obviously indicates that no settlement had been made. The petitioners made a specific contract *quoad* Gulf under which they could not have any royalty until they had established in Cause No. 398, or by compromise, title, and thus to do there was an implied if not an express obligation. And when petitioners as at this point seek to impress the court with there being no conflict at any time as to Gulf Refining Company or the Tidewater Associated Oil Company they are in serious error, for they have consistently from their own viewpoint fought the fight for those to whom they assumed they owed fealty.

Counsel then say as to this demurrer (Br. p. 63):

> "• • • The point here made is that the action of the Mississippi state court on the cross-bill after overruling the demurrer did not square with accepted Mississippi practice or with the constitutional requirements of due process of law."

Breaking this down, first as to requirements of Mississippi law, it will be noted that petitioners admonished that they

might not try this case on the merits if they would reserve their right to challenge in Mississippi's supreme court the rectitude of the Chancellor on his ruling to dismiss, chose to have that dismissal entered pursuant to well established rules, and having thus elected that rendered requisite under the Film Transit case, quoted *supra,* was not to overrule the demurrer, but to dismiss with prejudice. Thus petitioners got precisely what they bargained for. But going one step further, petitioners withdrew from Mississippi's court and protested in no uncertain terms that they would take no part further in this cause, and that now by petitioners asserted is that they overspoke themselves—that they did not mean, if you please, what they said, and that when they withdrew they did not intend to go way off and not come back, but they intended to sojourn at a respectful distance so that they might at their pleasure forthwith return and file an answer to this cross bill. With deference, petitioners are not toting fair with the Court in this contention. The chancery court had a right to believe that petitioners meant precisely what they said, and what they said was (Br. p. 75)

> "Complainants are still standing on their objection and in doing so we beg leave to respectfully withdraw from the court room."

Here plain English was being used. Mr. Buchanan specifically told them before they withdrew that evidence was going to be introduced and when they withdrew they withdrew, and both Mississippi's courts were entitled to take them at their word and so did. On this question of fact as to what was meant by an oral statement in open court to the court itself is not a question whereasto certiorari is appropriate for the United States to subordinate a judgment of a sovereign state. Compare *U. S.* v. *Johnson,* 327 U. S.

106, 90 L. Ed. 562, 566. But go one step further and assume that these foregoing points are not well-taken, and that under Mississippi practice petitioners had a right to raise this question, we still aver that Mississippi's court acted properly within Mississippi's laws.

Counsel appropriately refer to Section 1289 of the Mississippi Code (Br. p. 64):

> "It shall be the duty of the chancellor to act on said demurrer promptly and in his decree he will fix a reasonable time to amend or answer * * *"

and to Section 310 of Griffith's Chancery Practice, but note that therein said not quoted by counsel:

> "* * * If the demurrer be overruled the court will require that in a reasonable time all the circumstances considered, the defendant shall file his answer, the considerations being much the same as those controlling when a defendant under motion applies for additional time. But our court has said that when a demurrer is overruled and there is no application for time to answer, and no suggestion of any cause for delay, it is proper to require an answer *at once*, and none being filed to take the bill as confessed and decree accordingly; and certainly the latter is the rule when the defendant expressly declines to plead further."

Herein, with the declaration of respondents ringing in his ears that they were withdrawing in order to render possible the judgment they sought so that they might seek review of what was being done, the chancellor, we submit did precisely what petitioners expected, precisely what they sought to have him do, and are not now in a position to complain thereof. They wanted expedition in jurisprudence, and when the demurrer was overruled and the chancellor had been advised that these parties would not be back, what

was the use of waiting. *"Lex cogit neminem ad vana seu inutilia,"* Broom's Legal Maxims, p. 252.

In short, with petitioners declaration that for determination by the chancellor under Mississippi practice was a question of fact, nothing more, conceding that he had to determine what was a reasonable time. Compare *Bud Hall* v. *Eastman-Gardiner Co.*, 89 Miss. 588, 43 So. 2. But certiorari is never granted to determine questions of fact. Compare also Griffith's Chancery Practice, Section 262, wherein is said:

> "• • • If however upon the overruling of a demurrer, the defendant makes no application to amend, or if on a motion to test the sufficiency of an answer it is adjudged insufficient in law, and no leave to amend is applied for, it is the usual practice to proceed to a final decree on the bill without the formality of taking a decree pro confesso, the facts to be recited in the final decree. Indeed, it has been held that even in cases of total default it is not essential to take a formal decree pro confesso if the record shows that it would have been allowed, and the final decree is supported by the bill. In other words, if the state of the record is such that a decree pro confesso was proper, the failure to formally take it is an irregularity only and is not fatal to the final decree."

Compare *Cole* v. *Johnson*, 52 Miss. 94; *Hambrick* v. *Jones*, 64 Miss. 252, 8 So. 176.

(b) Under the Federal Constitution under the cases hereinabove cited as to this matter the decisions in this court are uniform—that no wrong was done petitioners.

Compare *Hammond Packing Company* v. *Arkansas, supra*, wherein a judgment for $10,000.00 was rendered for precisely this course of conduct under a Arkansas statute, and the judgment was held perfectly valid under the Federal Constitution, and the fact that the parties against whom it

was rendered might have a defense on the merits was immaterial. They were subject to an adverse judgment solely for such refusal to answer.

Counsel say (Br. p. 65):

> "None of the requirements of this statutory scheme were observed by Gulf or enforced by the court in acting on the cross-bill."

With deference, as held by Mississippi courts, every requirement was conformed to. Having lost their case on two separate grounds at least, petitioners seek to grasp that which may return them to the position which they voluntarily abandoned. Herein, as above noted, petitioners specifically declared they had "burned" their bridges behind. Frankly, we are unable to comprehend the meaning thereof unless they did precisely what they said, and if they thus burned it was quite impossible under their plan to retrace and re-litigate for, and when they thus did then they would thereby have foregone that upon which they claimed to have exclusively relied, namely, the right to dismiss without prejudice. Under this cross-bill petitioners would then have tried this cause in the chancery court of Jasper County, a thing which they voluntarily determined to forego, and if they initially so did as to the issues of fact actually joined, it is inconceivable that they would have again joined issue when this demurrer was overruled, for according to petitioners, issue was already joined, and on the original bill, the case ready for trial, and it is fundamental that the trial of an original bill may not be, under Mississippi practice, delayed by the cross-bill. Coordination is requisite to presentation in this wise. Compare *Griswold* v. *Simmons, et al.*, 50 Miss. 137:

> "The case for this court, therefore, is narrowed down to trivial points of practice, no way involving or affecting the merits of the controversy or rights of the parties.

"1. That the original cause proceeded in disregard of the cross-bill.

"A cross-bill does not stay proceedings in the original cause, except by order of the court, upon motion and notice. 2 Barb. Ch. Pr., 134, 2 Danl. Ch. Pr., 1656."

Petitioners say (Br. p. 66):

"The presumption is that petitioners would have answered the cross-bill because they were litigating every single issue."

But that is precisely what petitioners apparently declared they were not doing. They withdrew from the courtroom to litigate one issue and there can be no presumption as to what "might have been" in the face of a declaration of fact that it would not be. Presumptions disappear in face of facts. Compare *M & O. RR Co.* v. *Holt*, 62 Miss 170; *N. O. G. N. RR Co.* v. *Waldern*, 133 So. 241, 160 Miss. 102; *Mobile and Kansas City RR Co.* v. *Turnipseed*, 219 U. S. 35, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226; *Tot* v. *U. S.* and *U. S. of America* v. *Delia*, 319 U. S. 463, 87 L. Ed. 1519.

20 Am. Jur., Section 160, page 164, says:

"Stated differently, a presumption is rebutted when facts to the contrary are established."

In their discussion that which petitioners overlook is that the original bill had not been dismissed and that this was a cross-bill whereunto they had demurred, and on the issue joined between the original bill and the answer it was requisite that the case go forward, not to be delayed by the cross-bill, and our position unequivocably is that it does rest upon valid, non-Federal grounds, namely, those enumerated, plus the voluntary election of petitioners to withdraw. Compare *Hammond Packing Company* v. *Arkansas, supra.*

Petitioners declare (Br. p. 69):

"Gulf did not resist petitioner's motion to dismiss."

But see petitioners declaration as to the machination of Gulf (Br. p. 70):

> "Thereupon one of the attorneys for Gulf arose and expressed the idea that the chancery court had exclusive jurisdiction to adjudicate the case and adverted to the fact that Gulf had interposed a cross-bill."

See, also, what is said on this point by the Supreme Court of Mississippi, Appendix, 86.

We advert to the contract between the oil companies and petitioners whereunder petitioners specifically contracted that it would be a condition precedent to any recovery of royalty that petitioners established their right in Cause No. 398, or by compromise, and with this specific provision in that contract contained, petitioners saw fit to demand that in accordance with Mississippi practice there be a dismissal with prejudice in Cause No. 398, and there so was, so that consciously petitioners put themselves in a position under the express contract, Clause 14, whereby the chancery court in Cause No. 398 determined no right of royalty could to petitioners accrue, and petitioners had contracted that such an adjudication would be conclusive. It is true that petitioners did file in the District Court a count seeking to reform Section 14, but the reformation sought went only to the extent of integrating, instead of "the chancery court of Jasper County," "any competent court." Confessedly, the chancery court of Jasper County was a competent court and having thus adjudicated under petitioners contract all that was involved would have been the simple interpretation of this contract whereinto petitioners entered and which would preclude by an express contract any relief to petitioners in virtue of that by them

specifically done. The interpretation of a plain contract is not a federal question involving no impairment within the contract clause.

Petitioners take the remarkable position that an amendment to Gulf's cross-bill was requisite to set up therein the acquisition of title from petitioners when petitioners well knew that Gulf was relying upon its original leases, and specifically reserved the right to attack just as fully and completely as if the lease had not been executed, and Gulf did that which it specifically reserved the right to do, and openly contracted that it would do, and for this contract petitioners accepted $50,000.00.

VII

Petitioners claim:

> "In Awarding Judgment Against Petitioners and in Favor of Gulf Refining Company in a Case not Justifiable Because it Had Become Moot."

whereto respondents answer:

(a) Those things hereinabove set out, not repeated to save prolixity.

(b) This contention rejected by the Supreme Court of Mississippi, Appendix, 82.

(c) Petitioners say (Br., p. 72):

> "*Gulf of course endeavored to retain some fancied right* to continue the pending litigation."

The right was actually retained and was not a mere fancied right. Note Clause 14, Appendix 50, 52, whereon we stand firmly and demand the contract rights there prayed for.

(d) Petitioners overlooked that at no time did the chancellor allow the original bill to be dismissed without preju-

dice. He dismissed it with all parties in court with prejudice, and might we say, petitioners caused this to be done, and when they did, where were they under the contract embodied in the 14th Section?

VIII

Petitioners contend:

> "In Awarding Judgment Against Petitioners on Cross-Bills Which on Their Face Showed No Right to Relief and to Which a Demurrer had Been Interposed; Especially After the Original Bill Has Been Dismissed."

whereto respondents reply:

(a) Those things hereinbefore set out.

(b) Note the astounding claim, with deference not true, that a failure of respondents to deraign title under a state statute might constitute a violation of the 14th Amendment when the state court held the local statute in all things complied with.

(c) The original bill had not been dismissed. Note that said by petitioners (Br., p. 87):

> "The original bill was never dismissed by the court below, and the court below was never called upon to rule on the retention of the cross-bill after the dismissal of the original bill."

It was really a State question whether or not this demurrer should be sustained, and unquestionably Gulf had a right to confirm its leases, and did it not have the right to confirmation, it had a right to recover for the expenditures made in drilling the well. Whether there should be an affirmative pleading or a defensive pleading is not in

any way, so far as we can ascertain passed on as a matter whereon this Court would grant certiorari.

> "• • • It was important to Gulf Refining Company to know which was the valid title, that of the defendants, or that of the complainants. In order to be amply protected, it asked not only that complainants (petitioners) claim be dismissed, but also asked that its leases from its codefendants (respondents) be confirmed as against the claims of the complainants (petitioners)."

This quotation is from respondents' brief in the supreme court of Mississippi which was adopted as appropriate by that court.

In Sec. 380, p. 385, of his Chancery Practice, Judge Griffith, in speaking of the requirements of a cross-bill, says:

> "• • • But when pleaded with and as a part of the pleading containing the answer it is not required that the cross-bill shall contain a repetition of the averments contained in the answer; the allegations of the answer may be made a part of the cross-bill by any statement appropriate to that end, as for instance—'the cross-complainant hereby makes all and singular the denials and averments of his foregoing answer a part of this cross-bill to the same extent and as fully as if repeated herein.'"

citing *Phoenix Insurance Co.* v. *Smith,* 95 Miss. 352, 48 So. 1020. Compare *Buckingham* v. *Wesson,* (1887) 54 Miss. 526; *Vaughan* v. *Hudson,* (1882) 59 Miss. 421; *Carter* v. *Harvey,* (1890) 7 So. 286.

The cases cited by petitioners are not applicable to the constitutional question here at issue. However, advert to *Dewees* v. *Dewees,* 55 Miss. 315, and note that while it may be true that petitioners may have offered to refund to Gulf that expended in oil explorations, this might not have been done under Mississippi practice without a specific

prayer for judgment by Gulf to that end. This minor rule surely should not demand certiorari from this great Court.

Counsel claims (Br. 84):

> "• • • The failure of the Mississippi Courts to follow rules of practice concededly in force at the time under the circumstances here set forth constitutes a clear denial to Petitioners of due process of law."

Respondents deny that there was any failure thus to follow, but if there so were that herein done cannot in any aspect be imagined to be a violation of the due process clause. It would convert this Court into a harbor for the consideration of every type of question and emasculate this Court by compelling it to devote its time to that which was not in any way within the purpose of the Constitution and this court has been careful thus to do.

IX

Petitioners claim:

> "By the Decision of the Supreme Court of Mississippi on a Point Never Presented to or Passed on by the Lower Court and Which Petitioners never had a Chance to Defend."

Whereto respondents say:

(a) Fully answered *supra.*

(b) Petitioners say, "petitioners were never given a chance to defend," but so cocksure were petitioners of their assumed rights that they voluntarily burned all bridges and stood upon that which was well established as proper practice in Mississippi, and petitioners cannot overlook the fact that at the time of the rendition of this decree every necessary party was in the chancery court of Jasper County, and each necessary party so thus being under fixed

practice of Mississippi hereto admitted by petitioners, that court dismissed the bill of petitioners with prejudice, and having thus so done there was left undetermined that portion of the litigation having to do with the cross-bill of the Gulf, remembering that the petitioners have conceded that confirmation and cancellation were substantially synonymous, and their original bill having been dismissed they are not in that aspect entitled to allege error nor are they entitled to allege error as to the confirmation, because they concede that thereby they were not hurt insofar as the Chancery Court was concerned, and when the appeal was taken as petitioners desired it to be to the Supreme Court, that court affirmed the decree below, and the reason therefor, with deference, so far as this certiorari is concerned, is quite immaterial, being upon a ground of local factors, Mississippi's Supreme Court deeming it so clear as not to require examination of other factors inherently integrated and left specifically undetermined, all of which must needs have been determined before, with deference, a Federal question could have been in any way originated. Author-*supra.*

Naught contained in *Saunder* v. *Shaw,* 244 U. S. 317, 61 L. Ed. 1163, is in any wise here applicable for therein (Br. 92):

> "* * * But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here."

But petitioners invited this Court in the chancery court and made their complete record, and in the Supreme Court, that court merely looked to one of the contentions of the

respondents and found that in virtue of that contention petitioners were not entitled to dismiss without prejudice in the Chancery Court, Mississippi's court, with deference did not go further than the authorities hereinabove quoted allow.

Petitioners claim (Br. p. 94):

> "They were invited into court to face one situation and held in default for not facing another situation with which they were not presented."

This, with deference, we catagorically deny. Petitioners made their motion to dismiss and upon being refused elected to stand thereon, claiming that this refusal to dismiss was improper, having invited the dismissal with prejudice by the Chancery Court, the Supreme Court was free to determine as a matter of State practice whether that decree thus invited should be affirmed or reversed. For affirmance, the State Supreme Court found adequate warrant in the local practice as to cross-bills, and so finding was thus obligated to affirm. In short, petitioners' claim thereasto is so palpably contrary to the decisions in this Court as to cast discredit upon the entire proceeding, for it never has been the rule that either the district court or the State court should halt orderly proceedings so that that being done might be subordinated to that which might be done in the other tribunal in proceedings in personam. We reiterate that said so effectively by Mr. Justice Smith, quoting Mr. Justice Griffith in his book on Chancery Practice (Appendix, 85):

> "* * * And not only will the court retain the cross-bill in every case where if the matter had been brought in an original bill it would have retained it, but it should be kept in mind that the advancement of our procedure has developed a definite disfavor towards any practice which tends to turn parties out of court when once they

were fairly in, and of sending them away either to transform the pleadings or else to begin the matter over again."

X

Petitioners claim:

"By the Decision of the Supreme Court of Mississippi Affirming a Judgment Against Petitioners on the Cross-bills of Gulf Refining Company and the Ridgways Holding said Judgment to be Res Judicata as Between Petitioners and Defendants not Parties to Said Cross-Bills and as to Issues not Involved in said Cross-bills, and When This Point Was Not Involved in the Decision of the lower Court or Argued Before Said Supreme Court."

Whereto, our responses are:

(a) As hereinabove set out.

(b) If it should be, which with deference we deny, the effect of this judgment is for the court in which it is pleaded when it shall be pleaded, if it were true, which with deference it is not, that certain parties were not made parties, then the rule of Mississippi is that as to those parties thus circumstanced, the decree would be void. *Sivley* v. *Summers*, 57 Miss. 712, 730, approving Story Equity Jurisprudence, Sec. 4, page 27.

(c) We challenge the position that petitioners did not fully argue every possible view point to Mississippi's Supreme Court. The point made by counsel in the petition for certiorari that the Supreme Court has not passed on this contention is, with deference, inaccurate. In petitioners' Suggestion of Error, which should have been made a part of the record, almost in the very words here appearing every contention is found, and though thus made were not sustained by the Mississippi court. Compare Suggestion of Error, pages 54, *et seq.* And Petitioners cited substan-

tially the same authorities in the suggestion of error in the Mississippi court.

In addition to the foregoing, we call attention to the fact that petitioners gave bond for an appeal from the Chancery Court of Jasper County to the Supreme Court of Mississippi and the sureties thereon were: Lamar F. Easterling, George E. Shaw, Lester C. Franklin, Lester E. Wills and Ben F. Cameron; and when the Supreme Court affirmed this judgment, it rendered a judgment of affirmance and for cost recovery against petitioners and these five individuals, so as that presently the judgment in Mississippi's Supreme Court is against not only petitioners but the sureties as well. Only the petitioners sought certiorari. The sureties did not. Compare *Hartford Accident & Indemnity Co.* v. *Bunn*, 285 U. S. 169, 76 L. Ed. 685. This certiorari is attempted to be taken, not from a Federal court but from a State court. Under the reasoning in the *Bunn* case, with deference, this Court may not take jurisdiction thereover.

If this Court shall determine jurisdiction was not properly invoked, it should dismiss under the *Bunn* case, but if the jurisdiction was properly invoked, then, with deference, we submit

In Conclusion

Petitioners say (Br. p. 105):

> "By the decision and judgment in this case these petitioners stand with the doors of the Mississippi Courts closed to them without having had the opportunity to produce their witnesses and develop their case on the merits."

But petitioners themselves closed the door under a valid rule of Mississippi practice, and we say, with deference, they did it intentionally, and having invited the error are estopped from questioning that which was requisite under Mississippi law.

Counsel say (Br. p. 106):

> "The merits of the case are not involved. The points made by us relate to procedure alone—to the machinery by which the merits are reached."

The points made by us relate to procedure alone—and confessedly state procedure wherewith counsel were obviously familiar and where that is true this Court will not feel called upon to relieve petitioners who for reason invite the decree, and having gotten it exercised the right of appeal, and find contrary to their judgment that the Chancellor was better advised as to Mississippi law than were the petitioners, and so being, no complaint may here be made.

Respectfully submitted,

JOHN E. GREEN, JR.,
R. E. WILBOURN,
IRWIN W. COLEMAN,
MAJOR W. CALVIN WELLS,
W. R. NEWMAN,
STONE WELLS,
W. H. WATKINS, SR.,
P. H. EAGER, JR.,
W. S. WELCH,
GARNER W. GREEN,
Of Counsel for Respondents.

WILBOURN & WILBOURN,
Meridian, Mississippi;
WELCH, COOPER & WELCH,
Laurel, Mississippi;
WATKINS & EAGER,
Jackson, Mississippi;
GREEN & GREEN,
Jackson, Mississippi.

APPENDIX A

N. L. Huddson, *Grantor*,

To

Mary Huddson, his wife, *Grantee*.

Kind of Conveyance, Deed of Gift.
Date of Conveyance, Jan. 23, 1880.
Is it properly acknowledged? Yes.
Date of Filing for Record, Jan. 23, 1880.
Record in Deed Book 20, Page 155.
Consideration, Love and Affection. Paid or not ——.
Description of Land Conveyed ——.
E. ½ of SE. ¼ Section 19, and SW. ¼ of SW. ¼ Section 20, and W. ½ of NW. ¼ Section 29, and E. ½ of NE. ¼ Section 30. All in Township I, N. Range 13. E. situated in the First District of Jasper County, Miss.

APPENDIX B

State of Mississippi,
County of Jasper:

Know all men by these presents:

That Mrs. Lloyd K. Tilgham, Graydon M. Blackmon, Mrs. Gertrude Hudson Ellison, Mrs. Lessie Hudson Smith, May I. Hudson Thompson, Mrs. Grace Hudson Hyde, Mrs. Exie Hudson, Philip L. Hudson, Charles A. Hudson, E. S. Blackmon, Mrs. May Hudson, Mrs. Ruby Mae Mitchell, and N. L. Hudson, who represent and warrant that they are the sole existing heirs at law of Noah L. Hudson and Mrs. Mary E. Hudson, both deceased, late of Jasper County, Mississippi; and L. F. Easterling and L. C. Franklin, hereinafter caller "Lessor" (whether one or more) hereby grants to Gulf Refining Company, hereinafter called "Lessee," the exclusive right to explore the land hereinafter described for mineral indications, to drill and mine thereon

for oil, gas, sulphur and other minerals, and to produce and appropriate any or all of same therefrom; the right to use, free of charge, oil, gas and water from the land in conducting operations thereon and in treating to make marketable the products therefrom; the right to construct and use on said land telephone, telegraph and pipe lines and facilities for the transportation and storage of minerals produced therefrom, as well as salt water; the right to construct and use such canals and roads as are necessary for Lessee's operations hereunder; the right to remove from the land at any time any property placed by Lessee thereon, and all rights necessary to the full enjoyment of this lease; all, however, during the term and subject to the conditions hereinafter stated.

The said land is situated in First District of Jasper County, Mississippi, and is particularly described as follows, to-wit:

East half of Southeast quarter (E½ SE¼), Section 19; Southwest quarter of Southwest quarter (SW¼ of SW¼), Section 20; Northwest quarter (NW¼), of Section 29; Southeast quarter of Northeast quarter (SE¼ of NE¼), of Section 30; all in Township One (1), North, of Range Thirteen (13) East, comprising 320 acres.

For the purpose of calculating the payments hereinafter provided for, the superficial area of the land covered by the above description is estimated to comprise 320 acres.

1. This lease is effective as of the date January 1, 1940, and shall expire January 1, 1955 (hereinafter called "primary term") unless oil, gas or other mineral is being produced in commercial quantities or operations for drilling or production are being conducted on or from the above described land or any portion thereof on said expiration date of January 1, 1955, and shall continue in effect so long thereafter as such production is being had or operations for drilling or production is being conducted in accordance herewith.

2. Lessee may at any time execute and deliver to Lessor or to the depository hereinafter named, or place of record, a release or releases covering any portions of the land and

thereby surrender this lease as to such portion or portions and be relieved of all obligations as to the land surrendered. Any notice, release, or communication to Lessor may be given to Lessor personally, or by letter addressed to Lessor, care of Lamar F. Easterling, 1406 Deposit Guaranty Bank Building, Jackson, Mississippi. The Deposit Guaranty Bank & Trust Company, of Jackson, Mississippi, is named as depository hereunder.

3. If prior to the discovery of oil on the land and at a time when Lessee is not actually engaged in drilling operations on the land, a well producing as much as two hundred (200) barrels of oil per day for thirty (30) consecutive days is brought in on adjoining land and within two hundred (200) feet of any outside boundary of the land then held hereunder, Lessee shall, within a reasonable time, begin, and with reasonable diligence, prosecute the drilling of a well on the land then held hereunder in an honest effort to discover oil in paying quantities.

4. After beginning operations on the land, and prior to discovering any mineral in paying quantities thereon, Lessee may maintain Lessee's rights in effect for so long as it pleases, even beyond the primary term, by continuing such operations without lapse of more than sixty (60) days between cessation of operations on one well and the beginning of operations for drilling another.

5. After discovery of any mineral in paying quantities on the land, all of Lessee's rights shall remain in effect so long as any mineral is produced in paying quantities from the land; and if such production should thereafter cease for any cause after the expiration of the primary term, Lessee may maintain all rights hereunder by beginning reworking operations or additional drilling within sixty (60) days after such cessation.

6. After the discovery of any mineral in paying quantities, Lessee shall be exempt from loss or forfeiture of this lease in whole or in part, except after final judicial ascertainment that Lessee has failed to perform its duty hereunder, and thereafter Lessee shall have a reasonable opportunity to perform and prevent such loss or forfeiture,

and in event of final loss or forfeiture, there shall be reserved to Lessee all producing and drilling wells with forty (40) acres surrounding each well to be designated by Lessee.

7. Subject to and contingent upon the provisions of paragraph 14 hereof, Lessor shall be entitled to the following royalties: one-eighth (⅛) of the oil produced and saved and not used for fuel in conducting operations on the land or in treating to make marketable the products therefrom; one-eighth (⅛) of any waste oil from the land or coming on to the land from other sources, if utilized; on gas, including casinghead gas or other gaseous substance, produced from said land and sold for purposes other than the manufacture of gasoline, the market value at the well of one-eighth (⅛) of the gas so sold. If such gas is sold for the manufacture of gasoline therefrom, the royalty shall be one-eighth (⅛) of the amount realized from such sale. In the event said gas is used off the lease or in the manufacture of gasoline therefrom by Lessee, the royalty shall be one-eighth (⅛) of the market value of such gas at the well. The royalty for each well producing gas only shall be Two Hundred and No/100 Dollars ($200.00) each year until such time as the gas from such gas well shall be utilized in the manufacture of gasoline or sold off the land; on sulphur fifty cents (50¢) for each long ton marketed; on salt three cents (3¢) for each long ton marketed; and a reasonable royalty on any other mineral produced in quantities deemed by Lessee to be paying. These royalties are based upon the ownership of the entirety of the mineral rights by Lessor. If, in any event or at any time, Lessor owns less than such entirety of the mineral rights in any portion of the land from which any mineral may be produced, such royalties shall be paid only in the proportion that Lessor's interest in the mineral rights in such portion bears to the entirety of the mineral rights therein.

8. The oil royalty shall be delivered to Lessor at Lessor's option into storage tanks provided by Lessor at Lessor's expense on the land retained, or into any pipe line connected with the well; if Lessee provides such pipe line, Lessee may purchase such royalty oil at its posted market price for oil

of like kind and quality from the same field; if no storage tanks are provided by Lessor and there is no pipe line connected with the well, Lessee shall have the optional right to purchase the royalty oil at the market price at the well, or to sell such oil and to account to Lessor at the market price at the well.

9. Lessee shall bury its pipe lines below plow depth when requested by Lessor. No well shall be drilled nearer than two hundred (200) feet to the house or barn on said land without the written consent of Lessor, and Lessee shall be responsible for all damages caused by Lessee's operations other than damages necessarily caused by the exercise of the rights herein granted.

10. If the estate of either party hereto is assigned, and the privilege of assigning in whole or in part is hereby expressly allowed, the covenants hereof shall extend to their heirs, executors, administrators, successors or assigns, but no change in the ownership of the land or the minerals in and under the same or assignment of rentals or royalties shall be binding on Lessee unless Lessee shall have been furnished thirty (30) days payment hereunder of such royalties with certified copies of recorded instruments showing the muniments of title. If six or more parties become entitled to royalties hereunder, Lessee may withhold payments thereof unless and until furnished with a recordable instrument executed by all of such parties designating an agent to receive payment for all.

11. If by reason of labor troubles at manufacturing plants, or as the result of exercise of rights by governmental authority, Lessee is delayed or hindered in obtaining material or equipment necessary in drilling or completing a well, or if as a result of war, flood, storm, fire, blowout, differences with workmen, requisition or order of governmental authority, Lessee is prevented from commencing or completing the drilling of any well or wells, then in any such event Lessee shall be relieved during the period of such delay or the continuance of such preventing cause from all obligations, either express or implied, in

this lease contained to commence or complete the drilling of any well or wells; and Lessee shall not be liable to Lessor in damages for failure to drill any such well during the time Lessee is relieved from the obligation so to do; provided, this paragraph shall not have the effect of altering the condition under which this lease will remain in force beyond its primary term, unless at the time of expiration of the primary term Lessee is prohibited from drilling upon the leased premises by governmental orders in which event the primary term shall be extended automatically from year to year until the first anniversary hereof occurring 90 or more days following the cancellation of such governmental order; but inability to commence operations for drilling, and to drill, a well shall not relieve Lessee from the requirement of paying rentals if Lessee desires to continue this lease in force during any extension of the primary term, in absence of production, drilling and reworking operations, said rentals, for the purpose of this clause, after January 1, 1955, being fixed at the rate of One ($1.00) Dollar per acre per year, when lawfully demandable. In determining whether Lessee has used reasonable diligence wherever required by any obligation of this lease, express or implied, the causes of delay in this paragraph set forth shall not be exclusive of any other cause or causes which may exist. If for any period or periods of time after oil or gas has been discovered on the leased premises same is not produced because Lessee is unable to obtain and install by reason of any cause set forth herein, any equipment or material necessary for handling or transporting such production, then nevertheless during such period or periods of time it shall be considered for the purpose of continuing this lease in effect under the terms hereof that production of oil or gas is being had upon the leased premises.

12. Lessee is hereby given the right to pool or combine the acreage covered by this lease or any parts thereof with other land, lease or leases in the immediate vicinity thereof, when in Lessee's judgment it is necessary or advisable to do so in order to promote the conservation of oil, gas or other minerals, such pooling to conform to

drilling units prescribed by any applicable order of any governmental authority having jurisdiction of the subject matter, if such order be issued. Lessee shall record in the appropriate Records of the County in which the leased premises are situated, an instrument describing the pooled acreage. Operations for drilling or production on any part of a drilling unit composed in whole or in part of the land above described shall be considered as operations for drilling or production on land covered by this lease and the entire acreage constituting such unit or units shall be treated for all purposes as if same were included in this lease, except that in lieu of the royalties elsewhere herein specified Lessor shall receive on production from each of such units that proportion of the royalties herein stipulated that the amount of his ownership in the mineral rights in the acreage placed in the particular unit involved bears to the entirety of the mineral rights in such unit.

13. Lessor only warrants specially and shall not be obligated to refund the bonus received or any part thereof unless and except there be a breach of the special warranty occurring by claims of persons claiming by, through, or under the Lessor herein. In the event Lessor's title is disputed by suit or otherwise, Lessee shall have the right to withhold the payment of royalties provided for hereunder until the final determination of any such suit or dispute favorable to Lessor and shall have the right in such event to maintain this contract in force by giving notice to Lessor, or to the depository hereinabove named, of its intention to withhold such royalties. Lessee shall have the right to acquire or lease the interest of any party in said land and minerals which any such party claims is not covered by this instrument.

14. It is understood and agreed notwithstanding any provision of this instrument apparently to the contrary that Lessee does not in any way admit that Lessors, or any of them, have any right, title or interest in or to the lands, or any of them, covered hereby, or to any of the oil, gas and other minerals in and under or that may be produced therefrom, (unless and until Lessor establishes some title

to or interest therein either by compromise settlement or final decree in the suit entitled N. L. Hudson et al., complainants, *v.* The Gulf Refining Company et al., defendants, No. 398, Chancery Court for the First Judicial District, Jasper County, Mississippi) but on the contrary Lessee claims and asserts that it has good and valid title to all of the oil, gas and other minerals in and under and that may be produced from the land described in this lease by virtue of oil, gas and mineral leases heretofore executed by T. D. Lewis and Annie Lewis, recorded in Oil Lease Book 2, page 39; by Jettie Windham, G. R. Windham, Carrie Husband and Norman Husband, recorded in Oil Lease Book 2, page 251; by Margiree Jones and Abb Jones, recorded in Oil Lease Book 2, page 213, and by Mason Newell, recorded in Oil and Gas Book 6, page 547-548, all references are to the records of the First Judicial District of Jasper County, Mississippi. It is further expressly agreed that Lessee has accepted and does accept this lease from Lessor not in recognition of the title or claim asserted by Lessor, but it has accepted and does accept this lease solely for the purpose of buying its protection to the title or titles to the land covered hereby, together with all the oil, gas and other minerals thereunder, or that may be or have been produced from said land under the terms of the hereinabove mentioned leases; and Lessee shall never be called upon to recede from its position that it now has and owns valid mineral leases covering all of said lands; and it shall be just as free hereafter as it has been heretofore to assert that its lessors named in this paragraph have and had good and valid titles to the whole of the lands covered hereby and to all of the oil, gas and other minerals thereunder at the respective dates of execution of said leases; and it is further agreed that the continued assertion of such contention by Lessee shall in no manner be deemed or construed a repudiation of the terms of this lease.

And, further, notwithstanding any provisions of this lease apparently to the contrary, it is agreed and understood that Lessor shall not be entitled to and Lessee shall be under no obligation to pay to Lessor any of the royal-

ties, or any part thereof, provided for herein unless and until in the suit entitled N. L. Hudson, et al., complainants, *v.* The Gulf Refining Company, et al., defendants, No. 398, Chancery Court for the First Judicial District, Jasper County, Mississippi, lessor shall have established by a compromise settlement between the parties thereto, or by final decree of the court therein, that the lessor herein is the owner of the lands and minerals hereby leased and involved in said suit or the owner of an interest therein.

15. Lessee shall have the right at any time to discharge in whole or in part any tax, mortgage or other lien upon said land or mineral rights therein, including redemption from tax sale or adjudication and be subrogated to the rights of the holder thereof, and thereafter Lessee shall have the right to retain all rentals and royalties provided for hereunder, or any portion or portions thereof, and apply same towards reimbursements of Lessee for such payment upon giving notice of its intention to so apply such payments to Lessor or to depository named herein.

Lessor acknowledges receipt of Ten ($10.00) Dollars and other considerations, paid by Gulf Refining Company, as the full and adequate consideration for every right granted herein. The property above described is not homestead of Lessor.

Thus done, read, and signed on this the 15 day of Dec., 1944.

MRS. GERTRUDE HUDSON ELLISON,
By E. Q. HYDE,
Attorney-in-fact.
By C. A. HUDSON, Charles A. Hudson,
Attorney-in-fact.
By N. L. Hudson,
Attorney-in-fact.
MRS. LESSIE HUDSON SMITH,
By E. Q. HYDE,
Attorney-in-fact.
By CHARLES A. HUDSON,
Attorney-in-fact.

(Continued on page 86)

(Continued from page 85)

By N. L. HUDSON,
Attorney-in-fact.

MAY I. HUDSON THOMPSON,
By E. Q. HYDE,
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By CHARLES A. HUDSON,
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By N. L. HUDSON,
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MRS. LLOYD K. TILGHAM,
By PHILIP L. HUDSON,
Attorney-in-fact.

GRAYDON M. BLACKMON,
PHILIP L. HUDSON,
CHARLES A. HUDSON,
MRS. MAY HUDSON,
MRS. RUBY MAE MITCHELL,
N. L. HUDSON,
L. F. EASTERLING,
L. C. FRANKLIN,
MRS. GRACE HUDSON HYDE,
By E. Q. HYDE,
Attorney-in-fact.

By CHARLES A. HUDSON,
Attorney-in-fact.

By N. L. HUDSON,
Attorney-in-fact.

E. S. BLACKMON,
By E. Q. HYDE,
Attorney-in-fact.

By CHARLES A. HUDSON,
Attorney-in-fact.

By N. L. HUDSON,
Attorney-in-fact.

STATE OF MISSISSIPPI,
County of Hinds:

Personally appeared before me, the undersigned authority, in and for said county and state the above and within named, L. F. Easterling and L. C. Franklin, who acknowledged that they and each of them signed and delivered the foregoing instrument of writing on the day and year of its date and for the purposes therein expressed as their own act and deed.

Given under my hand and seal of office, this the 19th day of December, 1944.

MRS. FLORENCE WALLACE,
[SEAL.] *Notary Public.*

My Commission Expires Sept. 9, 1947.

STATE OF MISSISSIPPI,
County of Hinds:

Personally appeared before me, the undersigned authority, in and for said county and state, the above and within named, E. Q. Hyde, Charles A. Hudson and N. L. Hudson, attorneys in fact for the above and within named, Mrs. Gertrude Hudson Ellison, Mrs. Lessie Hudson Smith, May I. Hudson Thompson, Mrs. Exie Hudson, Mrs. Grace Hudson Hyde, and E. S. Blackmon, who acknowledged that for and on behalf of the said above and within named, Mrs. Gertrude Hudson Ellison, Mrs. Lessie Hudson Smith, May I. Hudson Thompson, Mrs. Exie Hudson, Mrs. Grace Hudson Hyde, and E. S. Blackmon, that they signed and delivered the foregoing instrument of writing on the day and year of its date and for the purposes therein expressed as the act and deed of the said Mrs. Gertrude Hudson Ellison, Mrs. Lessie Hudson Smith, May I. Hudson Thompson, Mrs. Exie Hudson, Mrs. Grace Hudson Hyde, and E. S. Blackmon, and that they were duly authorized thereto.

Given under my hand and seal of office, this the 19th day of December, 1944.

MRS. FLORENCE WALLACE,
[SEAL.] *Notary Public.*

My Commission Expires Sept. 9, 1947.

STATE OF ——,
County of ——:

Personally appeared before me, the undersigned authority, in and for said county and state, the above and within named, Mrs. Lloyd K. Tilghman, who acknowledged that she signed and delivered the foregoing instrument of writing on the day and year of its date and for the purposes therein expressed as her own act and deed.

Given under my hand and seal of office, this the — day of December, 1944.

—— ——,
Notary Public.

STATE OF MISSISSIPPI,
County of Hinds:

Personally appeared before me, the undersigned authority, in and for said county and state, the above and within named, Graydon M. Blackmon, who acknowledged that he signed and delivered the foregoing instrument of writing on the day and year of its date and for the purposes therein expressed as his own act and deed.

Given under my hand and seal of office, this the 19th day of December, 1944.

MRS. FLORENCE WALLACE,
[SEAL.] *Notary Public.*

My Commission Expires Sept. 9, 1947.

STATE OF LOUISIANA,
Parish of Ouachita:

Personally appeared before me, the undersigned authority, in and for said parish and state, the above and within named, Mrs. May Hudson, and Mrs. Ruby Mae Mitchell, who acknowledged, that they and each of them signed and delivered the foregoing instrument of writing on the day and year of its date and for the purposes therein expressed as their own act and deed.

Given under my hand and seal of office, this the 18 day of December, 1944.

ROBERT COWDEN,
Notary Public.

STATE OF MISSISSIPPI,
County of Hinds:

Personally appeared before me, the undersigned authority, in and for said county and state, the above and within named, N. L. Hudson and Charles A. Hudson, who acknowledged that they and each of them individually signed and delivered the above and foregoing instrument of writing on the day and year of its date and for the purposes therein expressed as their own act and deed.

Given under my hand and seal of office, this the 19th day of December, 1944.

MRS. FLORENCE WALLACE,
[SEAL.] *Notary Public.*

My Commission Expires Sept. 9, 1947.

STATE OF ——,
—— of ——:

Personally appeared before me, the undersigned authority, in and for said —— and state, the above and within named, Phillip L. Hudson, one of the Lessors in the foregoing instrument of writing, who acknowledged that he signed and delivered the foregoing instrument of writing on the day and year of its date and for the purposes therein expressed as his own act and deed.

Given under my hand and seal of office, this the — day of December, 1944.

—— ——,
Notary Public.

STATE OF MISSISSIPPI,
County of Hinds:

Personally appeared before me, the undersigned authority, in and for said county and state, the above and within named, Phillip L. Hudson, attorney-in-fact for Mrs. Lloyd K. Tilghman, who acknowledged that for and on behalf of the said Mrs. Lloyd K. Tilghman, he signed and delivered the foregoing instrument of writing on the day and year of its date as the act of the said Mrs. Lloyd K. Tilghman, and that he was duly authorized thereto: Also, personally

appeared before me, the undersigned authority, Phillip L. Hudson, individually, one of the lessors in the foregoing instrument, who acknowledged that he also signed and delivered the foregoing instrument of writing on the day and year of its date and for the purposes therein expressed as his own act and deed.

Given under my hand and seal of office, this the 19th day of December, 1944.

MRS. FLORENCE WALLACE,
Notary Public.

[SEAL.]

My Commission Expires Sept. 9, 1947.

THE STATE OF MISSISSIPPI,
Jasper County, First District:

I, J. J. Denson, Clerk of the Chancery Court in and for said County, hereby certify, that the accompanying Instrument was filed in my office for record on the 21 day of December, 1944 at 4:15 P. M., and that the same, together with the certificate of acknowledgment, was this day recorded in Deed Book No. 18, Pages 479-485.

Witness my hand and official seal this 16 day of Jan., A. D. 1945.

J. J. DENSON,
Clerk,

[SEAL.]

By EMITZ JOE HEWITT,
D. C.

APPENDIX C

No. 398

In Re: N. L. HUDSON, et al

vs.

GULF REFINING Co., et al, First District, Jasper County

GENTLEMEN:

I have called a special term of the Chancery Court of the First District of Jasper County beginning the first Monday in May. The above case will be triable at that term.

It has come to my knowledge that certain parties interested in the case have made threats against certain litigants, witnesses and attorneys. Of course, I have no personal knowledge that any such threats have been made. But it is my duty, as I see it, to see that all officers of the court, litigants and witnesses are protected.

Section 4240 of the Code of 1942 requires the Sheriff to attend all sessions of the court "with a sufficient number of deputies or bailiffs." I am directing the Sheriff to appoint 12 deputies from the western part of Jasper County, men of character and courage, to attend the special term of court, and it is my purpose to require the Sheriff and his deputies to search every person who comes in the court room. I want every one who is connected with this case to understand that it is my purpose to see that they are protected while attending court.

I am writing you confidentially for the reason that I do not care that any notice be given of this action to the public.

If you have any suggestions to make I will be glad to hear from you.

With regards and best wishes, I am,

Your friend,

(S.) Geo. B. Neville,
Chancellor.

APPENDIX D

In the Chancery Court of the First Judicial District of Jasper County, Mississippi

No. 398

N. L. Hudson, et al,

v.

Gulf Refining Company, et al

Complainants—Defendants

Final Decree

This cause coming on this day to be heard on original bill and amendments thereto, answers of all of the defend-

ants thereto, and the cross-bill of Gulf Refining Company as against complainants as cross-defendants and the general demurrer of cross-defendants to said cross-bill, and proof, came the parties complainant by their attorneys and filed herein written objections to the jurisdiction of the court to try this case, but asked for no order to be entered thereon; and all the defendants announcing ready and demanding trial; and the Court being of the opinion that the court has jurisdiction to try this cause at this term, and there being no motion for or grounds for a continuance of the said cause, announced that the trial thereof should proceed;

Whereupon the attorneys for complainants announced to the Court that they would not proceed with or take part in any trial of the cause but would withdraw from the court-room which they then and there did;

Thereupon the defendants offered evidence in open court to sustain their defenses to the original bill and amendments and evidence to sustain the allegations of the cross-bill of Gulf Refining Company; and the Court having heard and considered the pleadings, and the proof, doth now find, order, adjudge and decree from the pleadings and the competent proof as follows:

1

That this Court has jurisdiction to adjudge and decree in the manner and form as it now does, and does not recognize the right of complainants to withdraw as was wrongfully done, the Court reaffirming the Court's prior ruling refusing to allow a dismissal of said cause without prejudice by decree heretofore entered in said cause.

2

That the complainants are not entitled to the relief prayed for nor to any relief and that the original bill and all amendments thereto be and they are hereby dismissed with prejudice.

3

That the demurrer of complainants and cross-defendants to the cross-bill of Gulf Refining Company be and it is hereby overruled.

That the Gulf Refining Company as cross-complainant is entitled to the relief prayed for in its cross-bill against complainants and cross-defendants and that the leases possessed by the Gulf Refining Company as listed in its original answer and cross-bill and recorded as follows, to-wit:

(1) Jettie Windham, G. R. Windham, Carrie Husband, and Norma Husband to Gulf Refining Company, recorded in Oil & Gas Record Book 2, at page 251, of the records of the Chancery Clerk of the First Judicial District of Jasper County, Mississippi.

(2) Margiree Jones and Abb Jones to Gulf Refining Company, recorded in Oil & Gas Record Book 2, at page 213, of the records of the Chancery Clerk of the First Judicial District of Jasper County, Mississippi.

(3) Mason Newell to Gulf Refining Company, recorded in Oil & Gas Record Book 6, at page 547, of the records of the Chancery Clerk of the First Judicial District of Jasper County, Mississippi.

(4) T. D. Lewis and Annie Lewis to Gulf Refining Company, recorded in Oil & Gas Record Book 2, at page 219, of the Chancery Clerk of the First Judicial District of Jasper County, Mississippi; and amendment thereto recorded in Oil & Gas Book 9, at page 341 of said records.

are hereby adjudged and decreed to be good and valid; and that all claims of title, right or interest on the part of the complainants and cross-defendants and each of them in and to any or all of the lands covered by said leases are hereby canceled, annulled, and for naught held, and adjudged to be without foundation in fact or in law, and that the cross-complainant Gulf Refining Company is not due complainants and cross-defendants any royalty or royalties whatsoever.

5

That no final record herein shall be made except that this decree shall be entered on the final record book and recorded as deeds are required to be recorded.

6

That complainants and cross-defendants pay all costs herein to be taxed and that decree therefore is hereby entered against all such complainants and cross-defendants and the sureties on their bond for costs filed heretofore in this cause, for all of which execution may issue.

Ordered, adjudged and decreed in open court this the 6th day of May, 1946.

(S.) Geo. B. Neville,
Chancellor.

APPENDIX E

IN THE SUPREME COURT OF MISSISSIPPI

No. 36,406

(Opinion rendered April 21, 1947)

Division B

N. L. Hudson, et al.,

vs.

Gulf Refining Company, et al.

L. A. Smith, Sr., *J.*

Thirteen heirs of N. L. Hudson, Sr., claiming to be the sole and only owners in fee of the 360 acres of land described, as well as of all the mineral interests therein, filed their bill in the Chancery Court of Jasper County against 106 defendants, including the Gulf Refining Company (which, under a mineral lease from certain of its co-defendants, had developed and was developing its holdings

into an actual oil-producing acreage), and against other defendants, who, in addition to Gulf Refining Company, claim under other mineral leases covering in the aggregate all of the lands in question.

The claim of the said Hudson heirs is that during the year 1877 or 1879, N. L. Hudson, Sr., the then owner of the land, had conveyed all of it to his wife, M. E. Hudson, for the term of her natural life, and at her death to the children of said N. L. Hudson, Sr., for life, the remainder in fee to their children; that the deed was duly recorded, but the record thereof was destroyed by the courthouse fire in September 1932; and that complainants have not been able to find the original deed for recordation. It was further averred that N. L. Hudson, Sr., died in 1895, and M. E. Hudson, in 1928, and that subsequently to the date of the deed conveying a life estate to her, M. E. Hudson had executed deeds of conveyances to various grantees as if she owned the title in fee simple. Complainants, appellants here, also charged that by these conveyances the 106 defendants were, as latest grantees or their heirs, the present adverse claimants; and that by reason of the facts, supra, appellees had become, and remained since the death of M. E. Hudson, the tenants at sufferance of the complainant heirs.

Nearly all of the numerous defendants answered, and Gulf Refining Company and some twenty-five other defendants made their answers cross-bills. The answers denied that Hudson had made any such deed to his wife in 1878 or 1879, or at any other time in any such terms as asserted by complainants. On the contrary, they averred that, in fact, Hudson had made to his wife, M. E. Hudson, on January 23, 1880, a deed to the lands in fee simple absolute, this deed being recorded in Book 20, p. 135 of the record of deeds of the county. The defendants, appellees here, averred also that by unbroken chains of title from M. E. Hudson to them, as well as by more than forty years of adverse possession, they have become the owners, and that the complainants never in fact owned any interest whatever in the lands.

The answer by Gulf Refining Company, in addition to elaborate denials and averments touching the title by executed conveyances, adequately alleged adverse possession

in its predecessors in title for the long period of years aforesaid. Making its answer a cross-bill, it prayed that its mineral lease be confirmed as against the original complainants, and prayed for alternative as well as for general relief. The twenty-five other defendants who made their answers cross-bills, in addition to setting up their particular interest in the premises, adopted all the denials and averments of the answer of the Gulf Refining Company and likewise, and as stated, made their answers cross-bills. The answer and cross-bill of Gulf Refining Company was filed on Sept. 16, 1944, and those of the other twenty-five cross-complainants on September 30, 1944. On December 12, 1945, the complainants filed a motion to dismiss their original bill aforesaid without prejudice, which motion was actively resisted by numerous of the original defendants, and the motion was overruled.

Had there been no cross-bills, it may have been that the complainants would have had the right to dismiss, as they sought to do, but leaving that question aside for the moment, we are of the opinion that they had no right to do so and at the same time secure the dismissals of the cross-bills, unless by the consent, express or implied, of the cross-complainants.

In days gone by it was the general rule that the dismissal of the original bill carried with it the cross-bill, but the modern rule, and particularly in this State, is as stated in Griffith Miss. Chancery Practice, Section 384, which reads as follows:

"The strict theory of the cross-bill is that it is a dependent of the original bill, in consequence of which formerly it was generally held that a dismissal of the original bill carried with it the cross-bill, but this rule too has been departed from so that now if the cross-bill seeks affirmative relief separately and independently of the original bill—although, of course, growing out of or touching the same subject matter involved in the original bill, as it must—the court will at the insistence of the cross-complainants retain it and proceed with its issues, if the cross-bill and its facts be complete enough within themselves and without the aid of the original bill which no

substantial aid is furnished by the original bill, and as to Gulf Refining Company it prays that its title be confirmed in it as against all the original complainants. This right to have an affirmative adjudication in chancery of title to real estate is one conferred by statute, supplementary to the ancient rules in equity on that subject. It is not so clearly of law as to be distinctly a better subject of determination at law, the fact being that, at this day in this State, land-title questions are almost always presented in the chancery court, the action of ejectment having become nearly obsolete in actual practice, and certainly so in cases involving parties as numerous as in the instant case.

It is said, however, that as to Gulf Refining Company, the latter filed no objections to the motion to dismiss and thus did not insist that its cross-bill be retained, to which Gulf Refining Company replies, citing Griffith Chan. Prac., Sec. 407, that no formal objection or response to such a motion was required, and the burden of proof to support it was on the movant; and further that the record above shows that Gulf Refining Company, by its attorney, was present and participated in the hearing wherein the motion to dismiss was resisted.

We are of the opinion, therefore, that the court was correct in not dismissing the cross-bills, and in proceeding to a final hearing on them, without the attendance of cross-defendants, who purposely absented themselves; and, further, that upon the record the court was correct in sustaining the cross-bills on the merits.

This brings us back to the original bill—whether it should have been dismissed, retaining the cross-bills. This, as it seems to us, has now become, as to all practical purposes, a moot question. Under the cross-bills every issue and question, which could have been determined under the original bill, were adjudicated against the original complainants and cross-defendants in favor of cross-complainants and their privies. Thereby the whole matter has now become res adjudicata. Van Zandt *v.* Town Braxton, to make the granting of relief thereon practicable and proper. It is at last a matter within the sound discretion of the court to be

wisely exercised towards the advancement of justice between the parties. And not only will the court retain the cross-bill in every case where if the matter had been brought in an original bill it would have retained it, but it should be kept in mind that the advancement of our procedure has developed a definite disfavor towards any practice which tends to turn parties out of court when once they were fairly in, and of sending them away either to transform the pleadings or else to begin the matter over again. Therefore, it is only when the matter of the cross-bill, independently considered, is so clearly of law as to be distinctly a better subject of determination at law, that a cross-bill will be dismissed, or transferred, merely because the original bill has been dismissed."

This statement is in accord with the weight of authority elsewhere, as may be found in 30 C. J. S., Equity, Sec. 388, pp. 804-806.

Thus it is seen that the cross-bill will be retained where, if the matter therein had been brought in an original bill, it would have been retained, and that in such case it is only when the matters of the cross-bill, independently considered, are so clearly of law as to be distinctly a better subject of determination at law, that a cross-bill will be dismissed merely because the original bill has been dismissed. In other words, where the relief sought by the cross-bill is a matter cognizable at law, dismissal of the original bill carries with it, generally, the cross-bill, and the cross-complainant is relegated to his remedy at law. But here the prayer of the cross-bills sought confirmation of title to land, and hence was equitable, as pointed out further in the succeeding paragraph.

Here, the cross-bills bring forward, with elaboration, the issue of adverse possession, and rely thereon in addition to the title by conveyances, a feature in respect to 149 Miss. 461, 465, 115 So. 557; Watkins *v.* State Board, 170 Miss. 26, 32, 154 So. 277. Upon similar principles see also Griffith's Chan. Prac. Secs. 263, 363, 571, 624.

In view of the foregoing announcement of our conclusion here, which completely determines the ultimate solution of the problem on the appeal before us, we do not deem it nec-

essary to discuss other points, on both sides, ably argued in the several briefs filed.

The decree of the Chancery Court will, therefore be and is affirmed.

Affirmed.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 270

N. L. HUDSON

v.

MASON NEWELL et al.

No. 271

N. L. HUDSON

v.

T. D. LEWIS, et al.

No. 272

N. L. HUDSON

v.

JETTIE KELLY WINDHAM, et al.

No. 278

N. L. HUDSON

v.

MARGIREE JONES, et al.

APPEARANCES:

For the Plaintiff—Honorable L. F. Easterling, Deposit Guaranty Bank Building, Jackson, Mississippi; Honorable Lester Franklin, Century Building, Jackson, Mississippi; Honorable George E. Shaw, Century Building, Jackson,

Mississippi; Messrs. Cameron & Wills, Threefoot Building, Meridian, Mississippi.

For the Defendants—Messrs. Wilbourn, Miller & Wilbourn, Meridian, Mississippi; Messrs. Welch & Cooper, Laurel, Mississippi; Honorable J. R. Buchanan, Laurel, Mississippi; Honorable Irwin W. Coleman, Box 2513, Jackson, Mississippi; Honorable C. C. Richmond, Box 2513, Jackson, Mississippi; Messrs. Green & Green, Standard Life Building, Jackson, Mississippi; Honorable J. Morgan Stevens, Standard Life Building, Jackson, Mississippi; Messrs. Wells, Wells & Newman, Lamar Life Building, Jackson, Mississippi; Honorable John E. Green, General Counsel, Gulf Refining Company, Houston, Texas.

Be It Remembered that on, towit, the 14th day of March, 1946, the above entitled cases came on for hearing on motions to dismiss for lack of jurisdiction before the Honorable Sidney C. Mize, Judge of the United States District for the Southern District of Mississippi, at Jackson, Mississippi, when the following proceedings were had and done:

Mr. Buchanan: We wish to make the statement that A. G. Corchester in causes No. 270 and 278 is a citizen of Shreveport, Louisiana.

Mr. Cameron: We agree to that.

Mr. Buchanan: A. G. Dorchester, in Cause No. 270, is the owner of a 1/16 royalty interest in the W½ of the E½ of Section 19, Township 1 Range 13 East, which tract is unitized with the E½ of E½ of SE¼ of Section 19, Township 1 Range 13 East. Both of the unitized wells were drilled on the tract of land described as the W½ of E½ of SE¼ of said Section 19.

Mr. Cameron: Plaintiff agrees that the two wells are on the Jones tract, which is the W½ of this 80 acre tract, and that Mrs. A. G. Dorchester of Shreveport, Louisiana, owns a royalty interest on the Jones tract. The extent of that ownership we do not know and have no information about except hearsay, and would want proof on that. We know it is unitized, but I have never seen a copy of the unitization agreement.

The Court: Does that dispose of agreements in Cause No. 270? Will there be any other controverted issues of fact?

Mr. Buchanan: None as to unitization.

Mr. Green: As to the unitization, we very probably have copies which will be available.

The Court: Maybe you can agree on that later. (After discussion.) It is agreed by all parties in all the cases that N. L. Hudson, et al., signed the contract dated April 5, 1944, filed April 17, 1944, recorded in O. & G. Vol. 11, page 605, Jasper County, Mississippi, First District, which document is made Exhibit "A" to the joint answer of George J. Leiderion, et al., in Cause No. 270, and that this document may be considered as a part of the agreement in all of the cases hereinabove numbered, 270, 271, 272 and 278.

It is agreed that on September 11, 1944, N. L. Hudson, et al., executed a contract which was filed for record on September 23, 1944 in the office of the Chancery Clerk of Jasper County, Mississippi, and that a certified copy is now offered in evidence and marked by the Reporter as Exhibit "1" to this record.

It is agreed by all the parties that the document styled "contract" dated on its face the 5th day of November, 1945 and shown on its face to have been acknowledged on the 11th day of December, 1945, was signed by the parties whose names appear thereon and that same may be marked an exhibit hereto as Exhibit "2". This agreement is made by the parties, subject to the objections of any of the parties as to its relevancy or competency or legal effect, and the parties reserve the right to show whether or not those purporting to sign for someone else were duly authorized thereunto so to do. This document applies to all cases and the agreement is so understood.

In Cause No. 271 it is agreed that the oil, gas and mineral lease dated May 18, 1945 and marked Exhibit "C" to the motion to dismiss filed by T. D. Lewis, et al., was executed and may be considered as a part of the record in Cause No. 271 and in all other cases where relevant, material and applicable.

It is agreed between all parties that the map herewith marked Exhibit "3(a)", together with the affidavit of Joe T.

Goodman, marked Exhibit "3(b)" dated March 11, 1946, may be considered on this hearing wherever applicable to any of the cases.

It is agreed that the document marked "Unitization Agreement" dated the 12th day of June, 1944, between Tidewater Association Oil Company on the one part and Beckett, et al., on the other, was executed and is made a part of the record herein, to be considered if applicable, competent and material to any of the issues involved in any of the cases, and is marked Exhibit "4" to this record.

With reference to Exhibit "4", it is agreed that the Todewater Association Oil Company is a Delaware Corporation and C. B. Small, Jr., is a citizen of Louisiana and was at the time of the filing of the suit herein; and Claude B. Hammill is a citizen of Texas; that C. M. Beckett is a citizen of Texas; and that Joseph M. Perkins is a citizen of Texas, and each of them were citizens of Texas at the time the suit was filed.

It is agreed that Kenneth H. Wasson was, at the time of the filing of the suit, and is now, a citizen of Texas. It is agreed that L. P. Rush was at the time of the filing of the suit, and is now, a citizen of Louisiana.

It is agreed that the citizenship by the names of citizens set out in the document marked Exhibit "5" is correctly stated and that those people were at the time of the filing of the suit and now are citizens of the states set out in said Exhibit "5" respectively, and that this is true in all of the cases.

It is agreed that the affidavit of Claude S. Posey as to the citizenship of Lee McCormick may be introduced in evidence without any objection and marked Exhibit "6".

Mr. Cameron: In connection with the citizenship of Mr. McCormick, I desire to state that the instrument through which he was claiming royalty interests bears on the face of the instrument his address as Pinehurst Hotel, Laurel, Mississippi. I asked a couple of other men in the Pinehurst Hotel what state he was a citizen of and they told me he had moved to Mississippi and on that information we sued him. Soon after we filed the suit in federal court I saw the pleading filed by Mr. Wilbourne in which he declared that Mr.

McCormick was a citizen of Louisiana and I went immediately, before any answer was served in any of these cases, and dismissed as to Mr. McCormick.

The Court: It is agreed that Exhibit "B" to the motion to dismiss, filed by T. D. Lewis, et al., in Cause No. 271 herein is a correct photostatic copy of the original bill of complaint filed in the Chancery Court of Jasper County, Mississippi, and may be considered upon the hearing of all of the cases herein where applicable, competent and material.

It is agreed that in Cause No. 398 of the Chancery Court of Jasper County, Mississippi, styled N. L. Hudson, et al., v. Gulf Refining Company, et al., there was filed an amendment to the bill of complaint and that same may be considered by the Court on the hearing in the cases herein now being heard, as to any one of the cases or all of them where applicable, competent and material, and that a copy will be furnished to the reporter to be marked Exhibit "7".

It is agreed that in said cause in Jasper County, No. 398, a second amendment to the original bill of complaint was filed and that same may be considered by the Court herein on the hearing of these cases where applicable, competent, material and relevant, and that a copy may be furnished to the reporter to be marked Exhibit "8".

It is agreed between all the parties that the certified copies of conveyances herewith tendered to the reporter and marked Exhibits "19," "10," "11," "12," "13," "14," and "15," may be considered by the Court on the hearing herein in each and all of the cases where applicable, competent, relevant and material.

Mr. Stevens: It is stipulated that on the 16th day of March, 1944 Talmadge D. Lewis and his wife, Mrs. Ernie L. Lewis, executed and delivered a mineral royalty conveyance to their eight children, including Myrtle Lewis, then and now a minor, and that on the 17th day of May, 1944 the said Talmadge Dewitt Lewis and his wife, Mrs. Ernie L. Lewis, conveyed a second mineral royalty conveyance to their eight children, including the said Myrtle Lewis, a minor. I would like for Mr. Cameron also to stipulate that Myrtle Lewis is a minor and that her brother, Thomas Mel-

vin Lewis, has been appointed by the Chancery Court of Jasper County her legal guardian and that he has appeared for her in said cases.

Mr. Cameron: I agree to all that with the statement that Myrtle Lewis was inadvertently omitted from the complaint in this case through the error of the stenographer assuming that Myrtie and Myrtle were the same person and failed to put in the two.

The Court: It is agreed that the document marked Exhibit "16" is the protective lease or is a lease executed by Mrs. Gertrude Hudson Ellison, et al., dated the 15th day of December, 1944 to the Gulf Refining Company and may be considered by the court where applicable, competent and material to each and all of the cases now before the court for hearing.

It is further agreed that the documents numbered Exhibits "17," "18," "19," "20," "21," "22," "23," and "24," being powers of attorney, acknowledgments, etc., may be considered along with Exhibit "16" where applicable, competent, material and relevant to any of the cases herein on hearing, and that the Gulf Refining Company paid a cash consideration of $50,000 for this lease.

It is agreed that the document now handed to the reporter and marked Exhibit "25," showing the pipe line production, may be considered by the court in each and all cases where applicable, competent and material to the issues now being heard by the court, and that production is still continuing; and it is further agreed that the price at which this oil was disposed of was approximately 80¢, and this stipulation is for jurisdictional purposes and may be varied by any party interested as to the actual facts.

Mr. Buchanan: The defendants offer letter of February 8, 1946, written by Judge V. A. Griffith of the Supreme Court of Mississippi, together with certified copy of the order in Cause No. 398 of Jasper County, dated January 14, 1946; also certified copy of order of the Chancery Court of Jasper County dated January 18, 1946; certified copy of application for appeal by the plaintiffs in said cause and certified copy of the order of the Chancery Court of Jasper County overruling the application for appeal, which order is dated

February 1, 1946; and would ask that this be marked Exhibit "26" to the record.

Mr. Cameron: It is agreed between the parties that copies of the plaintiff's motion to dismiss without prejudice and all of the pleadings filed by the defendants in objection thereto, and the pleadings filed by the plaintiffs in response to said objections, in Cause No. 398 in the Chancery Court of Jasper County, Mississippi, may be inserted in the record in this case and considered by the court in each and all cases where applicable, competent, material and relevant thereto, and that these copies may be furnished to the reporter herein later by the plaintiffs, and all of the said documents to be bound together and marked Exhibit "27" to this record.

Mr. Cameron: It is agreed between the parties that the attorneys for Mason Newell, towit, Mr. J. R. Buchanan, may insert into the record all or any part of the interrogatories addressed by the plaintiff in the Chancery Court case to Mason Newell, and all or any part of his answers to those interrogatories, which document is to be furnished to the reporter by Mr. Buchanan in one binding and will be marked Exhibit "28."

It is also stipulated that interrogatories were addressed by the plaintiff to the Gulf Refining Company in said cause No. 398 and were answered.

Mr. Cameron: It is agreed that either party may place into this record all or any part of the evidence taken before the Chancellor on the motion to dismiss the Chancery Court case and that such evidence, when certified by the court reporter, may be inserted into the record by either party and marked Exhibit "29."

The Court: It is further stipulated in all these cases—No. 270, No. 271, No. 272 and No. 278—that each and all of the stipulations hereinbefore entered into and each and all of the documents hereinbefore put into the record may be considered by the court upon the hearing of the matters now before the court in each and every case where any of such stipulations or documents may be applicable, competent, relevant and material.

The Court: The court having been called upon to make a ruling as to who should proceed with further testimony upon the motions to dismiss, and the court having examined the pleadings, finds that the defendants have challenged the jurisdiction of the court by motion to dismiss the case in each of the cases for lack of jurisdiction, and the matter being before the court solely upon the question of whether or not the court has jurisdiction in each case, holds and rules that upon this hearing of the motion to dismiss for lack of jurisdiction that the duty to go forward with the evidence is upon the movants and, therefore, will call upon each one of the defendants to answer if there is any oral evidence or further evidence that he desires to present upon the hearing of the motion to dismiss for want of jurisdiction.

Mr. Green: We ask that the oath be waived and that Mr. Cameron be asked to take the witness stand.

The Court: Very well, Mr. Cameron you may take the witness stand.

Ben F. Cameron, of counsel for the plaintiff, the oath being waived, came to the witness stand and testified as follows:

Direct examination.

By Mr. Green:

Q. You are of counsel for the complainant in this case?

A. Yes sir.

Q. When did you become associated in this case?

A. I believe it was about the end of 1944, just after the $50,000 had passed, so that I didn't get any of that.

Q. Then, the contract which was made by the plaintiffs in this case with the Gulf Refining Company was made at a time when you were in no way connected therewith?

A. That is right.

Q. After this connection was had in 1944, this case proceeded in the state court until there was a motion made at the end of 1945 to dismiss?

A. The motion was filed December 12, 1945.

Q. Now, in this case there is an agreement that was marked Exhibit "2" to the bill that was assumed to be executed. This stipulation or agreement marked Exhibit "2" as I understand, was dated on November 5, 1945?

A. On its face it bears that date.

Q. Who prepared that stipulation?

A. I did.

Q. What was the reason that that stipulation was prepared?

A. Well, there were several reasons. Reason No. 1 was that Shaw and Cameron came into the case after Easterling and Franklin had gotten their assignments from the Hudsons. We had no assignment from the Hudsons and no employment with them. Easterling and Franklin had given us a partial assignment of their interests and it was agreed that when it was convenient we would have a new contract made making the assignment of 33⅓% interest or 40%, according to the circumstances, to the four lawyers so that we would have an equal share.

Q. Let me get it straight. There was a contract when you and Mr. Shaw came in whereby Mr. Easterling and Mr. Franklin gave you an interest in this matter?

A. Yes sir.

Q. Was that contract in writing?

A. Yes sir.

Q. Would you mind producing that contract in writing?

A. It was of record all the time. I have never had a copy of it.

Q. This is the contract to which you make reference? (Hands paper to the witness.)

A. No, it is not. This is a supplemental contract between the Hudsons on the one side and Easterling and Franklin on the other. They had two contracts with the Hudsons before we came into the case and you have exhibited both of them here. After we got into the case Easterling and Franklin assigned Shaw and Cameron a part of their interest, but not the whole of it.

Q. Is this the contract? (Shows the witness document marked Exhibit "1.")

A. This appears to be a certified copy of the partial assignment made by Easterling and Franklin to Shaw and Cameron, dated the 17th day of January, 1945.

Mr. Green: I now offer this in evidence as Exhibit "30" to this record.

Q. Now, that assignment was made by Judge Easterling and Mr. Franklin to you and Mr. Shaw?

A. That is correct.

Q. And that assignment continued in effect until, according to your statement, the execution of the conveyance of date November 5, 1945?

A. No, it did not. I have stated that the prime purpose of this new contract was to make certain the deal that Shaw and Cameron had with Easterling and Franklin. We took this assignment from these gentlemen and placed it of record and about two weeks after we took it, in discussions between Mr. Shaw and myself on one side and Mr. Franklin on the other it came out that Shaw and I thought we had one fourth. In other words, we were going along fifty-fifty with our friends. Mr. Franklin said, "Judge Easterling doesn't understand it that way. He thinks you have one-fourth together." In about an hour I wrote a note and sent the papers back and said we were sorry about the misunderstanding, but we were not willing to go along on that basis. Immediately we all got together and they said they were sorry too and said we could share fifty-fifty with them, and we went along on a gentleman's agreement with the understanding that when it was propitious we would have the Hudsons clarify the whole thing and give us a direct assignment. This instrument here was never in effect. We had a verbal agreement during that interim up until December 5, 1945 when we executed a new agreement.

Q. As I understand it, this agreement which we have just introduced conveyed to you and Mr. Shaw, as I interpret it, an undivided one-fourth interest.

A. That is what we thought—of what these folks would get out of it.

Q. There was a difference of opinion between you and your brother lawyers as to whether they meant one-fourth

for you and Mr. Shaw or meant as you stated—a major portion for Judge Easterling and Mr. Franklin.

A. That is right.

Q. Then, I understand that shortly after that condition arose you bundled the papers back and it was agreed that your interpretation of this contract as written was the correct interpretation?

A. No, we had a verbal agreement that regardless of what was said that they would get 50% and we would get 50% of any recovery that was gotten out of the case.

Q. That would be what that agreement provided for?

A. I really don't know. I never went into it. We had a gentleman's agreement to supersede that.

Q. That instrument was placed of record and has been recorded?

A. That is correct.

Q. Under these arrangements that were made there was a conveyance, was there not, to you and Mr. Shaw and Judge Easterling and Mr. Franklin of an interest in this land itself?

A. I don't think so. I never have thought so. I think the two instruments from the Hudsons to Franklin and Easterling show an intent and agreement that those two lawyers never got anything until by lawsuit or compromise they had earned something.

Q. Isn't it a face that in the powers of attorney which were submitted to the Gulf at the time this lease was executed that it was specifically provided in there that there should be a conveyance of 25% to Easterling and Franklin?

A. I have never seen that. If you will give me a minute I will read you the portion I assume you refer to: (Reading from Exhibit "17") "And we also hereby definitely and specifically authorize our said attorneys in fact to hire and employ such attorney or attorneys at law as they may deem advisable to represent our interests in and about said property and to contract with such attorneys at law for such compensation as they may think proper and as compensation to such attorneys at law or said attorneys in

fact may convey to said attorney or attorneys at law so employed by them an undivided interest in said property and in any and all claims and demands which we have against other companies or other people, said interest so conveyed to said attorney or attorneys at law not to exceed 25% of such interest." You asked me a legal question, Mr. Green. That invests these attorneys in fact with the power to convey to these attorneys at such time as the attorneys in fact should desire any interest in any property which might be recovered. That is my opinion and I think that is purely a matter of law.

Q. At the time you were discussing this matter you were not advised as to the provisions in these powers of attorney as to their conveyances?

A. No sir.

Q. As to what was said about the time that Judge Easterling and Mr. Franklin were required to join in the Gulf Lease, of course you know nothing about that?

A. Nothing except what they said.

Q. But it was a fact that they joined in the Gulf lease?

A. Yes sir.

Q. And they were made parties to that lease and the circumstances under which they were made parties to that lease—were you familiar with that or not?

A. No, I was not at all familiar with it. I have accepted what they told me.

Q. So when they were joined in this suit you had no knowledge as to how that was arrived at or what was said at that time?

A. No sir.

Q. Now, was there any desire on the part of the plaintiff in this case to abandon the court in Jasper County and transfer this case to the federal court?

A. You say on the part of the plaintiff?

Q. Yes.

A. Well, yes, when we recommended that we move to dismiss the case in the state court and file these cases in the federal court that was thoroughly discussed with these attorneys in fact and trustees and was approved by them.

Q. So the parties to this suit were satisfied with the way the suit was being handled in the Chancery Court and at a later time the attorneys, including your good self, called the plaintiffs in and discussed with them the transfer of this litigation to the Federal Court?

A. You say they were satisfied? I don't know. They live in Louisiana and knew nothing about what was transpiring. The only hearing we had was before Judge Neville about the production of some documents and they were distinctly dissatisfied with what happened there and said to us that day, "You will never win that case in this court."

Q. Who made the recommendation about transferring the case from the chancery court to the federal court?

A. The lawyers initiated it and recommended it to the litigants.

Q. How many litigants were talked to?

A. The three trustees. Mr. Blackman took it up with us and approved it.

Q. Who were the conferences had with?

A. All three of the trustees. They came to Jackson on December 4 and 5, 1945.

Q. Before December 5 did they know why they were coming to Jackson?

A. We had discussed it in Meridian back in June or July when the hearing on the motion was held. We discussed then going into the federal court.

Q. Then on the 4 and 5 of December there was a conference held in Jackson between the attorneys and the trustees of the plaintiff in this case?

A. Yes.

Q. As to the powers of attorney, did you have those before that time?

A. I did not. I had never seen them.

Q. Did you know what the powers of attorney provided as to those parties at that time?

A. Only what Judge Easterling and Mr. Franklin told me.

Q. On the 5th day of November you re-wrote or prepared that document which was signed on the 4th and 5th of December?

A. I couldn't give the date. That document was written and re-written about three times. My recollection is that we had it in our possession possibly a month before it was executed.

Q. When that document was formulated were you in conference with Mr. Hyde and the other trustees?

A. No sir.

Q. That document was prepared by you at a time when you didn't know what the power of these trustees was and at a time when you did not know what had been done with regard to the formation of the protective lease between Judge Easterling and Mr. Franklin and the Gulf?

A. I was hoping in a lease. I did not participate in the conference leading up to it. I had not seen this but I understood that they had plenary powers.

Q. In consideration of the clarification agreement that was made, you undertook to convey back to whom?

A. I am quoting from clause 4 of that new agreement dated November 5, but in fact executed December 5, 1945: "It is understood and agreed that this employment is contingent upon recovery and that the parties have not intended and do not intend that any interest in any land or property shall pass to the said attorneys until after final decree or consummation of a compromise, and that the said heirs are not to pay anything to said attorneys for their services except in the event of a compromise or recovery; and said attorneys hereby convey and quit-claim to the said Hudson heirs any interest in any land or property which may have vested in them by virtue of the instruments herein mentioned or any other contracts which may have been made between the parties." I think that is the only clause in there that had reference to anything like you asked me about.

Q. That conveyance to the Hudson heirs,—they were not in any way named, were they?

A. That is the language there. My assumption would be that in the reference in clause 4 to the said Hudson heirs the reference would be to those enumerated in the contract.

Q. Those were not the Hudson heirs in the entirety?

A. I have never figured out who the Hudson heirs were.

Q. When you prepared that instrument you did not go to the deed and find out who the Hudson heirs were and the proportion each of the heirs were to participate?

A. No sir.

Q. In that reconveyance you have used the phrase "Hudson heirs", I believe, specifying the portion of the 40% vested in you and Mr. Shaw and Judge Easterling and Mr. Franklin?

A. That speaks for itself.

Q. When you were dealing with that reconveyance how were you dealing with the money which had been paid to Judge Easterling and Mr. Franklin?

A. Judge Easterling and Mr. Franklin had collected whatever fee came to them out of that settlement. I know nothing about that.

Q. When you were revising the contract under which Judge Easterling and Mr. Franklin got that payment you made no reference to that at all?

A. No sir, they explained to me that the deal between them and the Hudsons always had been that they didn't get anything at all of property or money until they had actually realized something by compromise or by winning the lawsuit. They insisted that throughout that is the only deal they had with the Hudsons.

Q. In this situation there was accumulated royalty that was then due to Judge Easterling and Mr. Franklin and yourself and Mr. Shaw. What disposition did you make of that accrued royalty?

A. You said we didn't have any royalty and we realized that we didn't get any royalty until we licked you for the Hudsons.

Q. Assuming that you would lick us as of the date of the removal of that oil from the well, you would have been entitled to a royalty and a large part of that royalty was past due at the time of that agreement?

A. I think as a matter of law that when you convey land it carries with it all accruals of royalty.

Q. It carries future royalties?

A. The instrument that had been executed did not convey anything to those two lawyers until they had won the lawsuit and we were trying to clarify that feature.

Q. Now, there isn't any doubt about the fact, is there, that there was a direct conveyance in that contract to Judge Easterling and Mr. Franklin?

A. In my opinion, this contract, construed in connection with the other contract, shows a definite agreement with the lawyers for a contingent interest to be paid and to be paid only when something had been recovered.

Q. Will you read that contract and see if it doesn't convey in the present tense to those lawyers as of the date of the execution of the instrument?

A. That is correct. At your instance I have read the contract of April 5, 1944 between the Hudsons and Judge Easterling and Mr. Franklin down through the point, "Undivided one-fourth interest in and to all of said land or minerals recovered." In my opinion that was an agreement to make a conveyance in the future and definitely repudiated the thought that anything was presently conveyed.

Q. In your own way tell me the facts about this?

A. You asked me earlier in the examination when it was that a new contract with the lawyers was made. I told you there were several reasons why it was made. I have given you the first reason. Certainly the first in point of time. There was to be put in legal form the connection with Shaw and Cameron in the case and take it out of the realm of being just a gentleman's agreement. The occasion for the new contract grew out of the fact that the lawyers had decided to recommend to the Hudsons the bringing of the proper suits in the United States District Court and accompanying that with dismissal without prejudice of the cases in the state court. That occasion arose in this way. We incubated the idea and studied on the idea of probably coming into federal court, and made many investigations and wrote many letters back and forth. We had weekly conferences for the best of five months. Those conferences averaged half a day. Somewhere along the line somebody, I would say Mr. Franklin, said, "Don't you reckon those

lawyers will take the position that Judge Easterling and I are indispensible parties?" We got out the contracts and we read them. We decided that you could not make a valid point because those contracts construed by their four corners meant an assignment to take effect after the fruits of victory had come into possession. Also, we got out the Mississippi statute about lawyers not have to be made parties to a suit and we wondered if that would apply in federal court, but somebody suggested why not remove it from the realm of doubt and carry out the original contract that everybody agrees was the contract, and that is execute a document which would certainly be effective only after the Hudsons had won something by compromise or by lawsuit. So when that suggestion was made we thought it wouldn't do any harm and we agreed that I would prepare a proposed draft, Judge Easterling would prepare a proposed draft, and then we would make the final draft, and that was done. Lester Wills drew up the draft I have here with me in October. Judge Easterling drew a draft and mailed it to me at Meridian. I took the two drafts and in the hurry that we always work under, I made this present draft and we had it ready I think in the early days of November. We had the suits pretty much prepared by then and on November 28 Judge Easterling wrote the trustees and asked them to come over here. So on December 3 they wired that they were on the way and would get here Tuesday, December 4, about noon, I believe. They got here then and I hadn't gotten here, but on December 5 we met, all except Mr. Shaw, who was out of town and he had told us he would be out of town. We met and had a conference lasting most of the day, in which we went over with them thoroughly the matter of dismissing without prejudice in the state court and coming into federal court. We read them cases and went into it fully with them and then we took up the matter of the contract with them. We discussed that at very great length and then I read them this draft. They brought up certain features of that and finally we all agreed on the draft which I had prepared and which had been in the file since early November. There in Room 502 in the Century Building on December 5 the two Hudsons, Mr. Hyde, the three trustees,

Judge Easterling, Mr. Franklin and I sat down and signed two or three or four copies of this contract. There was no acknowledgment on it. I didn't think it had to be acknowledged or ought to be acknowledged because it was purely a private arrangement between attorneys and client, but some of them thought we might want to file it for record. I sent and got a stenographer and dictated a little acknowledgment. She came back and it looked like a Japanese puzzle. Then we went to Judge Easterling's office. He dictated an acknowledgment and passed them their two copies and we dispersed. Either Mr. Franklin or I signed Mr. Shaw's name to the copy we gave them. They took these on in my opinion without an acknowledgment, but on December 5 acknowledged this instrument, the original of which I have before me and copy of which has been put in evidence. That was on Wednesday, December 5. On Saturday, December 8, Mr. Shaw got back to town and signed this instrument here and acknowledged it on Saturday, the 8th of December. The young lady in Judge Easterling's office took the acknowledgment of all of us, but Judge Easterling was out of the office and didn't come in until the 11th. She signed her name and affixed her seal on the 11th day of December, 1945. That is as far as I can recollect the history of that instrument, Mr. Green. I might say that the discussion was had with the Hudsons as to whether they wanted this new contract recorded. They said they would leave that up to us. We agreed that we would all acknowledge one copy and would decide later whether to file it for record. For my part, I will tell you why I didn't file it for record. I didn't think perhaps you would catch the point and make it if it were not filed for record, but I knew if it were you would make a point. I thought it would be embarrassing for the lawyers to be brought into court and I thought it would not be made and that is the reason it wasn't filed for record. The first time I ever saw any one of you at Paulding I think I said to somebody down there: "You all are mistaken about your point about the attorneys. We have no contract." I mentioned that to different ones of you.

Q. Now, there was no additional cash consideration paid?

A. None at all. It was to carry out the original intention which these trustees stated to have been the only intention any of them ever had, and all five parties to these original agreements agreed that they had never had any intention of making any deeds until the fruits of victory had come into hand, and to carry out the original intention was the only consideration.

Q. The situation was that the Gulf and Tidewater lessee were not consulted about any of the changes?

A. No sir.

Q. No reference was made by this contract to these leases?

A. No sir.

Q. At the present time, as I understand it, Judge Easterling takes one-fourth, Mr. Shaw takes one-fourth, Mr. Franklin takes one-fourth and you have one-fourth?

A. That is the way we would divide it. I think it is just 33-⅓% to all the lawyers in case of compromise and 40% in case we enter into a trial.

Q. In this situation, then, frankly the chief motive in recasting that contract was to bring it into the jurisdiction of this court?

A. I wouldn't say that was the motive. It was the occasion.

Q. I have absolute confidence in you and I don't want to ask you any questions except to let you tell it in your own way.

A. If there were any such motive I would saw we certainly had in mind that we wanted to put to rest that question if it should be raised. I have before me the original contract dated November 5, 1945. The execution date was, as I have stated, December 5, and we can't determine whose writing that "5" is, but evidently whoever put it in didn't change the month to December, but let it November, which was the month originally put into it.

The Court: Is there any further examination of Mr. Cameron by any of the other parties?

Mr. Green: There is one question I overlooked.

The Court: Very well.

Q. The S½ of NE¼, of NE¼, Section 30, was not embraced in any suit?

A. That is correct.

Q. Why?

A. There are only twenty acres involved. The Betheas are residents of Clarke County, Mississippi and are very close friends of the Donalds, who are my close kinsmen, and they are friends of friends of ours and they are old people. Mr. Bethea died recently and Mrs. Bethea is in need of money. There was so little involved, and I think Mr. Buchanan will bear me out. We decided if we could settle up this little bit of royalty we would dismiss it. I will go further and state that a great deal of royalty on the Bethea tract was owned by people who were residents of Louisiana or of Texas and the plaintiffs were largely residents of Louisiana and Texas, and to have sued them would have robbed this court of jurisdiction. There just didn't seem to be enough involved and coupled with the sentimental thought about the Betheas made me omit filing any suit thus far.

Q. So it was intended to omit the suit on the S½ of the NE¼ of NE¼ of Section 30?

A. Yes sir.

Q. That suit is still pending in the Chancery Court of Jasper County?

A. I don't think it is. I think our motion over there to dismiss is 100% good. I think that court has lost jurisdiction of the case, but as far as the docket and the order of the court goes, it is still pending.

Q. Now, in a general way, what is the value of these lands for oil purposes from your viewpoint?

A. Mr. Green, I have made quite a little investigation and I don't know what the royalty is selling for, but in my opinion $1500.00 per royalty acre is fair. The Mid-Continental Oil Industry has made a survey in which I think they estimate——

Q. I don't want all that opinion.

A. These lands in suit have a bearing generally of 4000 barrels to the acre at 80¢ per barrel, which would mean that

much royalty acre or a value of $3200.00, according to my best information.

Q. So that theoretically, in your judgment, the value of this royalty would be twenty times $3200.00?

A. Yes.

Q. That is a good deal — money, isn't it?

A. About $60,000.00, according to that. I am not saying we will not file the Bethea suit. All the way through I have said we have not filed them yet.

The Court: Is there any further examination of Mr. Cameron?

Mr. Green: None, your honor.

The Court: Have you any further statements to make on your own, Mr. Cameron?

Mr. Cameron: No sir.

The Court: Mr. Green, is there any further testimony you want to offer?

Mr. Green: Yes, your honor, I would like to call Judge Easterling.

Judge L. F. Easterling, the oath having been waived, came to the witness stand and testified as follows:

Direct examination.

By Mr. Green:

Q. You are of counsel for the plaintiff?

A. Yes sir.

Q. And with your good self and Mr. Franklin an agreement originated in this protective lease, did it not?

A. Yes sir, was consummated.

Q. I hand you an instrument and will ask you to look at Sections 7 and 14 thereof and see whether or not those are the provisions that were first agreed upon between Mr. Franklin and your good self and me as a proper exposition of the statement in this case?

Mr. Cameron: We object to that. The question of the meaning of this so-called Gulf protective lease is a matter of law and if it should be construed as claimed by some of the defendants, then we ask reformation. That goes to

the merit of the case and not to the motion to dismiss and we object to any evidence about the negotiations leading up to that lease.

Mr. Green: If it be that I can show, as I think I can, that there is absolutely no foundation for my friends' contention with regard to the reformation, that will be a matter that will be considered by the court in passing on the colorable character of this conveyance in considering jurisdiction.

The Court: I will sustain the objection on the ground that the instrument speaks for itself that was finally executed. Do you have the original agreement that was finally executed?

Mr. Green: No, your honor. What happened is this and this is what I offer to prove. That Judge Easterling on behalf of his clients and myself on behalf of the Gulf tentatively arrived at an arrangement and this arrangement is expressed in this instrument in Clause 14. That this tentative arrangement between Judge Easterling and me was submitted to Judge Atkinson, who was counsel for Gulf Refining Company at Shreveport, Louisiana and thereupon the Judge re-wrote Section 14 and Section 7 in the form that it was in evidence in the protective lease, except that in the protective lease as sent back by Judge Atkinson to me the word "peace" appeared instead of "protection", and when that matter was discussed between Judge Easterling and me in conversation over the telephone we prevailed upon Judge Atkinson to modify it to that extent. The word "protection" was substituted instead of "peace". Judge Atkinson absolutely said that in order to pay this $50,000 we had to have that contract in that precise form.

The Court: I will sustain the objection on the ground that the lease as finally drafted and executed is conclusive of the agreement between the parties.

Mr. Green: That is all from Judge Easterling. When it came to drafting this arrangement on behalf of the Tidewater Association oil companies substantially the same transaction occurred and Major Wells is present and can testify to it as I offered to prove on behalf of Gulf.

Mr. Cameron: We object to that for the same reason.

The Court: I will sustain the objection for the same reason. The document that was finally executed speaks for itself and is conclusive of the agreement.

Mr. Green: This further thought was that when this lease was executed, this protective lease of December 15, 1944, here at Jackson, the Gulf Refining Company had notice of the provisions of that contract which was entered into between Judge Easterling and his clients by the terms of the contract therein and at that time it was required that Judge Easterling and Mr. Franklin should, in virtue of the conveyance made, join in that lease.

Mr. Cameron: We accept the statement of counsel that they did ask Judge Easterling and Mr. Franklin to join in the lease, but Judge Easterling and Mr. Franklin didn't think they had any business joining in it, but offered no objection to it.

Mr. Green: The same offer is made on behalf of my friend, Major Wells, for Tidewater, except that those who joined therein were, in addition, my good friends Brothers Shaw and Cameron.

Mr. Cameron: We make the same statement to that.

The Court: Very well.

Mr. Green: So far as Gulf and the Ridgeway groups, we rest.

Major Wells: We offer Mr. Buchanan to testify with reference to the place of residence and citizenship of one of the defendants in this case, Mr. Corley.

The Court: Very well.

J. R. Buchanan, the oath being waived, came to the witness stand and testified as follows:

Direct examination.

By Major Wells:

Q. Will you please give us this information about Mr. Corley?

A. Sometime ago I had occasion to bring a suit for a client of mine against T. B. Corley and I made an investiga-

tion as to his place of residence and his citizenship. At the time he was working a little in Laurel, Mississippi. My investigation developed that he was a resident and citizen of Fort Worth, Texas. Later, when this suit was filed in Federal Court, Cause No. 272, I had occasion to talk to Mr. Corley and I asked him had he changed his residence from the place which I had found on my investigation and he told me he had not, that he still owned his home in Fort Worth and the ranch or farm in Fort Worth and that he had leased the residence in which he was living at Laurel. I had occasion to talk to Mr. Walter Bailey, who owns the residence in which Mr. T. B. Corley is living in Laurel and he stated to me that he had leased Mr. Corley the place—that Mr. Corley had leased the place from him.

Major Wells: I have no further questions to ask.

The Court: Very well, are there any further questions?

Mr. Cameron: On behalf of the plaintiff we object to the statements of Mr. Buchanan in which he attemp-s to give the results of an investigation he made about the citizenship of Mr. Corley because that necessarily would be based upon hearsay and would be incompetent, irrelevant and immaterial. We move to exclude his statements for that reason.

The Court: I will sustain the objection and will sustain the motion.

Mr. Cameron: We move to exclude the statement of Mr. Buchanan that Mr. Corley stated to Mr. Buchanan certain alleged facts about his residence because that is hearsay and is a self serving declaration of a party to this suit.

The Court: I will sustain the motion.

Mr. Cameron: We move to exclude the statement of Mr. Buchanan that Mr. Walter Bailey made the statement to him about some matter that would reflect upon Mr. Corley's citizenship because that is hearsay.

The Court: I will sustain the motion.

Major Wells: As far as the Tidewater is concerned, we have no further questions.

Mr. Buchanan: As far as our client in No. 270, 271 and 272 is concerned, we have no further evidence.

Judge Stevens: As I understand it, all this is on motion to dismiss.

The Court: Yes. Is there any further testimony by anybody?

Mr. Cameron: None for us, your honor.

The Court: It is agreed between all parties that on the map Exhibit "3(a)" the well located on the NE¼ of the NE¼ of Section 30 is on the line between the Mrs. M. M. Abner tract and the P. R. Bethea tract as shown on said exhibit.

Nos. 270, 27, 272 & 278

N. L. HUDSON

vs.

MASON NEWELL, T. D. LEWIS, JETTIE KELLY WINDHAM and MARGIREE JONES, et al.

I, Theresa Herbert, Court Reporter in the United States District Court for the Southern District of Mississippi, hereby certify that the foregoing pages contain a true and correct report of the proceedings had in the trial of the above styled cases on a motion to dismiss for lack of jurisdiction.

This, the 30th day of May, 1946.

THERESA HERBERT,
Court Reporter.